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Supreme Court, U.S.
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No. 94-8729

In The

Supreme Court of the United States

October Term, 1995

TINA B. BENNIS,

Petitioner,

v.

STATE OF MICHIGAN ex rel.
WAYNE COUNTY PROSECUTOR,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Michigan

JOINT APPENDIX

LARRY L. ROBERTS
Assistant Prosecuting Attorney
Wayne County
Prosecutor's Office
1441 St. Antoine
Detroit, Michigan 48226
(313) 224-7011
Counsel for Respondent

STEFAN B. HERPEL
206 S. Fifth Ave., Suite 200
Ann Arbor, MI 48104
(313) 930-0852
Counsel for Petitioner

Petition For Certiorari Filed March, 29, 1995
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RELEVANT DOCKET ENTRIES

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10/25/88	Answer of Defendants Tina and John Bennis
11/16/88	Judgment Ordering Forfeiture of Car
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07/19/93	Court of Appeals Opinion Reversing Judgment of Circuit Court
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12/30/94	Michigan Supreme Court Opinion Reversing Court of Appeals
01/23/95	Remittitur Order

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

STATE OF MICHIGAN EX REL JOHN D. O'HAIR, PROSECUTING ATTORNEY FOR WAYNE COUNTY,

Plaintiff,

-vs-

JOHN C. BENNIS and TINA B. BENNIS,

Defendant.
_____/

Civil Action
No. 88- - CZ
Public Nuisance
Abatement Action

A. George Best II
(P-27749)
Assistant Prosecuting Attorney
1441 St. Antoine,
Room 1158
Detroit, Michigan 48226
Phone: (313) 224-5738

88-824379 CZ 10/04/88
JDG: RICHARD C. KAUFMAN
MICHIGAN STATE OF
VS
BENNIS JOHN C

COMPLAINT FOR ABATEMENT OF PUBLIC NUISANCE

NOW COME the People of the State of Michigan, by and through JOHN D. O'HAIR, Prosecuting Attorney, County of Wayne, ANDREA L. SOLAK, Chief, Special Operations and A. GEORGE BEST, II, Assistant Prosecuting Attorney, and in support of this Complaint states unto this Honorable Court that:

JURISDICTIONAL AVERMENTS

1) This public nuisance abatement action is brought in accordance with MCLA 600.3801, et seq., as amended, which provides in relevant part that:

> Any . . . vehicle . . . used for the purpose of lewdness, assignation or prostitution . . . or used by, or kept for the use of prostitutes or other disorderly persons . . . is declared a nuisance, and the . . . fixtures, and contents of the . . . vehicle . . . are also declared a nuisance, and all . . . nuisances shall be enjoined and abated as provided in this act and as provided by the court rules.

2) Pursuant to MCLA 600.3805, as amended, the Prosecuting Attorney may initiate and maintain an equitable action to abate such nuisances and to obtain the perpetual injunction of any person, his servant, agent or employee, who owns, leases, conducts or maintains such vehicle which injunction shall be binding on the persons so enjoined throughout the judicial circuit in which it was issued. MCR 3.601(A).

3) Pursuant to MCLA 600.3810(2), as amended, an owner of a vehicle is deemed to be the person in whose name the vehicle is titled, and any chattel mortgagee or assignee thereof or other lien holder whose lien has been filed. The Plaintiff is required by statute to join such mortgagee, assignee or lien holder as a party defendant to the nuisance action.

4) The vehicle which is the subject of this action is specifically described as:

1977 Pontiac, VIN# 2L69P7P329868

5) Pursuant to MCLA 600.3825(1), as amended, when the existance [sic] of the alleged nuisance is proven, an order of abatement shall be entered by the court and the court shall direct the removal from the building or place of "all furniture, fixtures and contents therein and shall direct the sale thereof" and shall direct the "effectual closing of the buiding [sic] or place against its use for any purpose, and so keeping it closed for a period of one year."

6) Pursuant to MCLA 600.3825(2), as amended, any vehicle, boat, or aircraft found by the court to be a nuisance within the meaning of that chapter, is subject to the same order and judgment as any furniture, fixtures and contents as set forth in paragraph five, infra.

COUNT ONE

7) In support of this Complaint for Public Nuisance Abatement, the Plaintiff asserts the following facts:

(a) On 3 October 1988 at approximately 8:10 PM. an undercover Detroit Police Officer in the area of Sheffield and West 8 Mile Road in the city of Detroit observed KATHY MARIE PALARCHIO flag down the described vehicle drived [sic] by a male later identified as JOHN CHARLES BENNIS.

(b) After BENNIS stopped the vehicle, PALARCHIO was seen to enter the vehicle which then drove to the end of the block, turned around, and drove halfway back up the block where it parked.

(c) After the vehicle parked, PALARCHIO'S head was observed to drop below the windows of the car and

out of view of the officers. The officers approached the car and, upon looking inside it, saw PALARCHIO in the process of commiting [sic] an act of fellatio upon the erect penis of BENNIS.

(d) BENNIS and PALARCHIO were arrested and charged with indecent and immoral conduct. The observed conduct is a violation of MCLA 750.449a, engaging the services of a prostitute and MCLA 750.338b, gross indency [sic] between male and female.

(e) Investigation has revealed that PALARCHIO has eight prior arrests for accosting and soliciting, six arrests for disorderly conduct (flagging cars in an ares [sic] known for prostitution activity).

8) Investigation has revealed the titled owner(s) of the vehicle here at issue is(are): JOHN C. BENNIS and TINA B. BENNIS.

9) Investigation has revealed that the lien holder(s) of record related to the vehicle here at issue is(are): none.

10) The vehicle is currently being held by the Detroit Police Department pending conclusion of this matter.

11) The Plaintiff asserts that based on the allegations set forth above (and to be established at any hearing related to this action) the vehicle described herein has been used for the purpose of lewdness, assignation or prostitution, or has been used by, or kept for the use of prostitutes or other disorderly persons and that such use(s) mandate the finding that such described vehicle is a public nuisance that must be abated as provided by statute.

CONCLUSION AND RELIEF

WHEREFORE, the Plaintiff respectfully requests the following relief: (1) a finding by this Honorable Court that the described vehicle is a public nuisance; (2) the entry of an order of abatement directing the sale of the vehicle and its contents in accordance with the applicable statute; and (3) the entry of a permanent injunction against all persons described in this Complaint shown to have maintained the nuisance.

Respectfully submitted,

JOHN D. O'HAIR
Prosecuting Attorney
County of Wayne

ANDREA L. SOLAK
Chief, Special Operations

/s/ A. George Best, II
A. GEORGE BEST, II P27749
Assistant Prosecuting Attorney
11th Floor, 1441 St. Antoine
Detroit, Michigan 48226
Phone: (313) 224-5738

Dated: 4 October 1988

No. 88-824-379-CZ

In the Third Judicial Circuit for the County of Wayne, State of Michigan

Michigan

v.

John Charles Bennis and Tina B. Bennis

Transcript of Testimony of Tina Bennis

* * *

[152] TINA BENNIS

called as a witness by the Defense, being first duly [153] sworn, was examined and testified on her oath as follows:

DIRECT EXAMINATION

BY MR. DENENFELD:

Q. State your name for the record, please.

A. Tina B. Bennis.

Q. Your address?

A. 1901 Colonial, Royal Oak.

Q. Are you employed?

A. No.

Q. Are you related to the defendant in this matter, John Bennis?

A. Yes.

Q. How are you related to him?

A. I'm his wife.

Q. How long have you been married?

A. Nine years.

Q. Are you a co-title owner to the vehicle that has been seized in this case?

A. Yes.

Q. Can you describe for the Court when this vehicle was purchased and the circumstances under which it was purchased?

A. It was purchased in September and –

Q. September of 1988?

A. Yes.

[154] Q. You had the car for approximately how many days before it was seized?

A. Maybe three weeks, four weeks.

Q. How much did you pay for the car?

A. $600.00.

Q. $600.00 in cash?

A. Yes.

Q. Had you saved money to buy this car?

A. Yes.

Q. For how long?

A. It's been quite a while. We have never had two cars.

Q. Who did you buy it from, a dealer or private person?

A. Private.

Q. You had the car for three weeks before it was seized?

A. Yes, approximately.

Q. Were you present with your husband when he was driving home from work on October 3rd?

A. No.

Q. Did you have knowledge that your husband was going to do anything but come directly home from work?

A. No.

Q. Do you have any knowledge of your husband soliciting prostitutes?

A. No.

MR. DENENFELD: Nothing further.

[155] CROSS-EXAMINATION

BY MR. BEST:

Q. Mrs. Bennis, you have indicated I believe that this was a second car?

A. Yes.

Q. Okay. What is the type of car that you have, your first type of car?

A. It's a '78 Oldsmobile.

Q. All right. Some time on October 3rd or October 4th, did you become aware that your husband had been arrested?

A. Late in the afternoon on the 4th.

Q. How did you become aware of that?

A. He never came home from work and it got to be 8:00 o'clock in the morning. So, I called his work 'cause he's never done this before and I discovered he wasn't there. So I proceeded to go through Missing Persons. I thought he was missing. I actually thought something had happened.

So, the Livonia Police, I had to go out and make a report and then a couple of hours later, they had called me saying they had found him, that he was being held in Detroit and that's all they told me. They didn't tell me why.

Q. Did you then contact Detroit?

A. They just told me there was going to be a hearing at 2:00 o'clock but they still didn't tell me anything.

Q. Where does your husband work, ma'am?

[156] A. At a steel company in Livonia.

Q. You expected him home on October 3rd in the evening?

A. Yes.

Q. What time did you expect him home?

A. I don't expect him. He works till his jobs are done. It's not unnormal for him to to come in at 9:00 o'clock at night.

Q. He'd arrive home possibly earlier than that?

A. Yes.

Q. How many days a week does he work?

A. He works five days a week, sometimes overtime, weekends.

Q. The purchase price of the car was around $600.00?

A. $600.00.

Q. You saved up out of earnings that your husband earned at the steel plant?

A. Yes. I've done babysitting over the summer, things like that.

Q. So, part of the money is his and part is yours?

A. More mine. We use his for bills. I was saving mine on the side.

Q. Now, the other car, the '78 Oldsmobile, how long has that car been owned by the family?

A. Just this past summer, too. It was given to us.

MR. BEST: All right. Nothing further.

MR. DENENFELD: Just one more question, your Honor.

[157] REDIRECT EXAMINATION

BY MR. DENENFELD:

Q. I understand from your testimony, Tina, that your husband had never not come home at night before this?

A. No.

MR. DENENFELD: Nothing further.

* * *

Transcript of Bench Ruling of Trial Court

* * *

[178] THE COURT: Thank you. These matters by their very nature are tried by the Courts and have been so for centuries in terms of questions of civil relief.

The Court is not unmindful that this is the first of what may be a series of trials. So it should be – I don't know how to say this any more sharply or clearly, I'm confining myself to, A, the arguments made as a matter of law here in this case, and B, the factual presentation as made in this case.

Whether additional arguments or different legal arguments might be advanced in the cases to follow or next week or month, you take each case as presented and the same, too, with the factual situation. The next fact situation [179] may differ completely from this one.

So that when the Court speaks on this, in this matter today, it is for the matter before the Court, the case before us.

I try to stress that because I don't want to be misunderstood. I'm aware of the substantial public interest and various representatives of mediums that are here. That's number one. I'm speaking only as to this case. I'm not shutting the door to arguments that might be advanced in any other lawsuit.

Second, I think it's terribly important that everybody understand as a broadbrush stroke here that we are not attempting as a State of Michigan, as I read the statute, to try to take every car involved in every act of prostitution or lewdness or assignation any time any place and I think

it's strongly misunderstood that that could and/or should happen or that's what the statute calls for.

It is just the reverse or rather a requirement of this particular statute. It requires the demonstration that not only did an act of lewdness or prostitution or assignation take place and the vehicle was involved specifically or could be some other mode of transportation – here we're dealing with a particular car, and that coupled with it there must be a demonstration that it was a public nuisance encompassed here.

[180] A singular act some time some place is not going to be involved and every time somebody is involved in terms of this city or this county, the car is to be taken or something of that nature.

Specifically as to the testimony that this Court has heard, we have heard testimony that on October 3rd, 8:10 p.m., Officer Anthony and his partner were in the vicinity; that there had been previous arrests of the young lady in question by officer Anthony. He's familiar with her and familiar with the particular area; that observing her conduct with waving her arms back and forth on Eight Mile, in the Eight Mile/Sheffield area, he sets up a surveillance.

Some 15 minutes goes by and then Mr. Bennis in his vehicle in question, a '78 Pontiac, comes by and they then drive down onto Sheffield, a side street, and get themselves off of Eight Mile.

When the officer then observing the Pontiac turning and facing north on Sheffield, which is a residential street, the vehicle stops. The lights go off. The officer

waits till he loses sight of one of the two individuals in the car, the passenger, the female.

Without belaboring it, when the officer arrives, he sees a woman's head in the lap of Mr. Bennis. That ultimately Mr. Bennis's penis is noted to be exposed and his pants are down and that the young lady's mouth comes off of [181] Mr. Bennis's penis.

That by any definition is an act of fellatio and an act of fellatio certainly falls as far as this Court is concerned within the definitions provided, as long as we are satisfied that it's tied in with for money or for prostitution if you will.

Now, I think additional testimony that was presented is and it should be appreciated, this was some 7:55 or so in the evening. The officer has indicated and we stress this, I have to as far as I'm concerned look at all of the collective witnesses who testified.

If you single out a witness and say, "Well, the case rises or falls on that witness," it's true. There won't be a case. I don't know there could be a case under the statute with a single witness. Can't imagine how you would do it.

It's a fabric and you look at that collective fabric and if you will, a quilt, and you put that garment together through the series of testimony of individuals who appear before the Court.

The officer himself said that given his tasks, he has made three arrests in this immediate area. One extrapolates from that testimony that he himself has assisted

other officers in making arrests. It works in that fashion by its very nature.

[182] Miss Worthy testifies she's an assistant prosecutor. It's simply to demonstrate that no one is immune. I presume that's the demonstration or that she was willing to come forward.

I would presume this would be some moment of discomfort for someone to take time off to come to Court and indicate when you have lived in a neighborhood since mere May, 1988, and this is only the early days of November, and in one of those months she wasn't here. She was at a seminar in some other part of the country.

Since that time, she has been accosted seven to eight times while attempting to simply take a bus to go to work in the morning at 6:15 or 7:00 clock and even on Sundays when you're attempting to go to work. That it's caused her to be forced to walk on side streets rather than a main public thoroughfare of this particular community of Detroit.

Miss Kirksey indicated a necessity has arisen for the creation of a CB patrol in the area of the Green Acres, a CB patrol beyond that of a civic association that one might normally find and that she has indicated that once again as part of this fabric that in the months of July, August and September, there were some 32 observations; that they're imperfect by their very nature.

It's subjective. I concede that and also only as [183] good is that which someone wishes to write down. She allowed they're not on duty at all times by any means but it's part of once again the over-all fabric to look to.

She, too, has been the victim of being accosted just this past fall on Woodward in the afternoon, to suggest a very limited geographic area that you look at, probably at best a couple of square miles or a mile square, even to the area she was defining when she was accosted.

It's apparently frustration all over because the next testimony we heard was that from Miss Knight. We've heard early morning. We've heard now Miss Knight coming home at about 1:30 in the evening. She lives on the street next to the one we're dealing with here today; that there are people sitting in front of her house in automobiles at 1:30 a.m. in a residential neighborhood.

She can't say with a degree of frequency. There have been occasions where cars have actually had people getting out – women getting out and start walking back towards the bank parking lot at Eight Mile at that hour, 2:00 and 3:00 in the morning, 1:30 in the morning, consistent even with the testimony we heard here where a car is turned around and parked to the north.

There may be a rhythm or pattern on the part of those engaged, the ladies engaged in this kind of thing that they have a strategy or reason why they want to be able to [184] conceivably, if a CB'er comes up, they want to get back up on Eight Mile rather than stay off on the side streets.

I don't know, but she certainly indicated she's had the situation where there's this activity, this walking about and the problems she's had, that it goes back for a number of years back to 1982.

She speaks in terms of conclusions based on appearances, clothing or lack of same, hair, time of night, to assist her as I think it's within the purview of a layperson to suggest that she believes that these women are engaged in certain forms of conduct.

Mrs. Wilson, a mature woman, volunteered that her age was 59, who also lives on Gardendale, just the next block over, she has been a resident there since 1981.

At all times, day and night, every day, 365 days of the year, that she has had to suffer, put up with the acts and frustrations of those engaging in some forms of activity in front of her home, her neighbors, that you cannot even walk along Eight Mile Road now; that even when she wants to go for a little walk in the morning, she has to have her husband trailing behind her and even there, to their credit, you had police officers who expressed concern as to her welfare.

The heightened tensions that must be existing for all of that to take place. It's rather extraordinary. It's [185] right off a residential neighborhood.

She's indicated that she has observed these young women walking back and forth, never been on a bus but always at the bus stops.

She also describes the skimpy dressing and clothing and so forth. She observed the vehicles take the girls. The girls get in. Some signal. Some don't. Almost consistently and it stands to reason, stands to reason, that one doesn't engage in sexual activity for the most part while you're sitting there on Eight Mile Road. It's a little bit awkward and mot [sic] the least bit dangerous.

One could use a little play on words about the risk of being rear ended or something during the course of other types of activity but it stands to reason that one is going to go off to the side streets to avoid the risks of either arrest and/or danger to themselves.

Thus, you're going to go right smack into those side streets, those neighborhoods, into a residential area of the city and I have no doubt as Mrs. Wilson described it that this is taking place all times from her testimony and from the collective testimony of the others.

She's indicated that she's of course not come upon an actual act. I don't think that the statute required that but she certainly had occasions when she's seen two heads and then only one head above the dashboard or windows and [186] then off one goes back to Eight Mile Road.

She's indicated that it's two to three times a week that she had been subjected to this kind of observation.

Mr. Russell, who by the very nature of his work would suggest a chap trained in both analysis and observation, has lived on Gardendale for some 20 years. He says this is a growing, growing, growing problem.

He has on two occasions – how much do you need? Do you need two witnesses, three, five, ten? On two occasions where he's not out looking for problems and/or activity but attempting to live within his community, he has had occasion to come upon individuals at the alley south of Eight Mile and Gardendale and another time where they're outside of the vehicle in the corner behind that vacant building, both acts of fellatio.

He has been solicited by prostitutes some half a dozen times and along Eight Mile Road a month ago, on one of two occasions during the course of the summer, he's engaged in perhaps a wise and not-so-wise suggestion that some of the johns move on only to be subjected to verbal abuse and obscenities.

He has seen an increase in this activity and he has now reached the point where if he is like any other individual I know, he has a home in which some 25 percent of [187] his income probably goes towards the maintenance and upkeep of that home. That's the average in this country.

He now has to worry about his eight year old, five year old, those youngsters. Now can they go out and play like most of us used to do as kids or do you have to worry about your youngster then coming upon an act of prostitution, observing fellatio, cunnilingus or whatever it may be, but stay with just that before us today.

Every time you send your youngster out to play on the streets, he has already had that problem, he said, personally with the vacant lot that is just six doors north of him.

Mr. Parham then tells us that he recognizes Mr. Bennis. One of the reasons for the Court's ruling at the show cause proceeding was the risk of this type of vehicle and this type of activity continuing and that it seems to have been borne out.

Not that this vehicle was used again because I didn't allow it to be returned till such time as trial, but it is borne out to the extent that sure enough, there's a pattern

if you believe Mr. Parham and I do, of conduct such that there would be substantial reason to think after you have been chased off even this summer from a neighborhood by a security guard that you elect to come right back in to that general neighborhood of some mile and mile and-a-half [188] away.

If you're prepared to do that, I think my judgment at the show cause proceeding has been affirmed in terms of at least holding that vehicle till a speedy trial could be had.

Some of the things that I don't fully understand, I was a little surprised. I thought frankly that this was the only vehicle that the defendants in this case had and I can well appreciate – this is merely observation, that being the only car, that there was this true need to try to get their vehicle back in some fashion.

Now I learn there are two vehicles. This was a second car that was obtained this September for some $600.00. Well, so be it.

I don't know in every case what I'm going to do with co-title owners, holders of vehicles. I'm going to have to make a case by case determination.

I think the case law may allow for it but in terms of this Court's equity and authority, I'm going to exercise my discretion in each singular case and one remedy that I may employ depending upon the circumstances will be one of if I find the public nuisance and order the abatement, I may order after costs are deducted and vehicle sold, I may order one-half of the balance to go to what is referred to as the innocent co-title holder.

[189] That will be done on a case by case basis depending upon the evidence and proofs submitted.

In the instance before us here – well, see, the problem I've got is that the value is such that even under equity – well, we'll see. I just don't know that it's going to be anything here to be concerned with. If it suggests that this Court is reaching a conclusion, yes, you may so conclude.

I have heard suggestions here by the defense counsel, Mr. Bennis's counsel, that what we should do is block off some of the streets.

We have already called upon folks in a given community, many sub-sections of this city and other communities to put bars on their windows, to have alarms on their cars, to walk in absolute fear any day or night because of their neighborhood, and the quality and condition of their neighborhood and now, let's kind of box you in or kind of build up some walls some more. Now, you can't use your streets.

That smacks of an insensitivity that I don't really think was intended.

The criminal law is designed to address the individual before the Court. Whereas the civil remedy available here is designed to address a broader problem of a public nuisance and they are truly distinguishable in that [190] only this civil rememdy [sic] can in some instances address the problem.

One of a couple of different concerns raised, one is how can you tell a prostitute? I think it's somewhat specious to suggest that but for someone who has a card

or something to hand out saying, "I'm a prostitute," that one can't draw reasonable and rational conclusions.

I suggest that the standard was set in a slightly different factual situation by the Supreme Court Justice Potter Stewart of, "I know it when I see it."

He felt that he could define obscenity and I suggest, too, that so can any layperson define someone who is actively engaging in the business of accosting and soliciting on their street corner.

When I hear the collective conduct, unless Mr. Bennis of course who did elect to take his Fifth Amendment right and I won't draw an inference against that, unless and til such time as one would be in a position to argue that, "I was with some family member" or something of that nature, it's not uncommon to have based on the conduct we have heard along that strip, I think, by a preponderance of the evidence, I can be perfectly comfortable this was a young woman engaged in business to perform an act of gross indecency and lewdness as was Mr. Bennis.

The law also it should be understood is concerning [191] itself here with this geographic area before us and I've heard it argued, is this too strong a remedy, this civil remedy?

I don't know that that argument would be advanced if we were – I don't know – at Kercheval and Moran and the type of conduct I've heard continued day in and day out, night after night and day after day, 365 days a year, or if it were along Northwestern Highway in Oakland, I wonder what hue and cry there would be.

But what we have here, the individual in this case, an individual from another community, Royal Oak, comes in to show just blatant insensitivity.

You look about you and you see people's homes where they raise their children, where their families are living, where they are having probably most of their money in this world going towards the purchase and maintenance of their home, for one's personal pleasure one contributes to what is clearly established in this case to be a public nuisance in that community, the Pembroke, Livernois, Eight Mile, Woodward community.

That sort of insensitivity is such that when one says in return, you run the risk, sir, by engaging in that sort of conduct and contributing to the public nuisance of that, you run the risk of your automobile, I find that a perfectly reasonable balance to the rights of the citizens [192] of that community to be free of this kind of obscene conduct within their neighborhood.

It should also be noted and I heard reference to those who engaged in prostitution. I'm sure that somewhere along the line there's been someone from the organization that Mr. McGuire is, and this is not to be denigrating, who has along the line defended in some fashion those who are engaged in prostitution.

Now suggesting a remedy is too harsh or we're insensitive, that these women are going off and no one ever does anything about the johns, closed quote.

It's true. I suggest that for men, especially particularly for men, men in the law, men in Courts, trial Courts, Appellate Courts, we are insensitive because we

conceivably place ourselves in a but-for position or there but for the grace of God or whatever, some sort of mentality.

If you then say as to what remedy should we use and how should we try to solve this community problem, this public nuisance, well, I suggest to you that we have got jails. In point of fact, we don't.

Well, I suggest to you that put the prostitutes in jail and someone says, well, off she went for 60 or 90 days. No one sheds a tear, but let the john run the risk of the loss of some of his property, and everybody cries, "How [193] harsh, how severe a remedy."

But for the john, the young lady hasn't got any business. It's classic chauvinism and sexism where we are so concerned about some mere property rights or mere property loss, not rights, rights we should be concerned about but mere property loss versus the loss of one's freedom, if you were the prostitute, the woman, in terms of the balancing of the equities.

I find this law to be appropriate, as an appropriate remedy where the facts bear it out and the facts bore it out here, that we have a public nuisance.

I believe the remedies are such as I said that in a given situation, I would consider the concerns of Mrs. Bennis but I'm cognizant, A, there's another automobile. So, they are not without transportation.

B, I'm cognizant of the fact that there's no costs or there's practically nothing left minus costs in a situation such as this.

In a given case, I might look at a different situation, different car, age of car, value, so forth.

In the situation before me, there's really nothing to be able to be done here but fortunately there's another automobile.

If Mr. Bennis has a speck of decency left to him, let him worry about his transportation and give Mrs. Bennis [194] her automobile.

The vehicle is deemed to be a public nuisance. It shall be abated. It shall be sold. Costs to be deducted and the balance of the monies to the State of Michigan.

We'll take 15 minutes and start the other case.

MR. BEST: Thank you, your Honor.

(End Bennis trial)

* * *

STATE OF MICHIGAN

IN THE CIRCUIT COURT
FOR THE COUNTY OF WAYNE

STATE OF MICHIGAN EX REL JOHN D. O'HAIR,
PROSECUTING ATTORNEY FOR WAYNE COUNTY,
Plaintiff

v. 88-824-379 CZ

JOHN CHARLES BENNIS and TINA B. BENNIS,
Defendant/

ORDER/JUDGMENT

(Filed Nov. 16, 1988)

At a session of said Court held in the City County Building on 16 Nov 88 the Honorable Michael J. Talbot, presiding,

This matter came before this Court pursuant to a Complaint for Abatement of a public nuisance. At the trial of this matter conducted on 2 November 1988, testimony was received from witnesses of the Plaintiff and from TINA B. BENNIS. Based on the testimony presented, in light of the arguments of counsel, and with a full understanding of the statutes and court rules and case law precedents involved in this area,

IT IS HEREBY ORDERED THAT the 1977 Pontiac, jointly owned by JOHN CHARLES BENNIS and TINA B. BENNIS, for those reasons fully stated by this Court on the record made on the trial date, is a public nuisance and that said vehicle shall be abated as provided by the controlling statute.

IT IS FURTHER ORDERED THAT the proceeds derived from the sale of said vehicle pursuant to statute shall be disposed of in the following order of priority: the filing fee of this action shall be returned to the Office of the Wayne County Prosecutor, all police costs shall be paid to the Detroit Police Department, all attorney costs shall be paid to the Office of the Wayne County Prosecutor, any remaining balance shall be paid to the general treasury of the State of Michigan.

/s/ Michael J. Talbot
Hon. Michael J. Talbot

Approved As To Form:

/s/ A. George Best II
A. George Best II
Assistant Prosecuting Attorney

Paul J. Denenfeld
Counsel for Defendants

Order entered pursuant to 7 day rule.

/s/ Illegible

STATE OF MICHIGAN

COURT OF APPEALS

STATE OF MICHIGAN ex rel WAYNE COUNTY PROSECUTING ATTORNEY,

Plaintiff-Appellee,

v

JOHN CHARLES BENNIS and TINA B. BENNIS,

Defendants-Appellants.

July 19, 1993
9:45 a.m.

No. 132568
LC No. 88-824379

Before: Jansen, P.J., and Murphy and Marilyn Kelly, JJ.

MURPHY, J.

Defendants appeal from the judgment of the circuit court declaring their 1977 Pontiac automobile to be a nuisance and abating the nuisance, thereby terminating defendants' interest in the automobile. We reverse.

Defendant John Bennis was convicted of gross indecency in violation of MCL 750.338b; MSA 28.570(2), following an incident in which police officers observed Mr. Bennis engaging in a sexual act with a woman in defendants' 1977 Pontiac. Plaintiff then filed this action, alleging that Mr. Bennis used defendants' car for the purpose of lewdness, assignation or prostitution in violation of MCL 600.3801; MSA 27A.3801, and that the car was therefore a nuisance subject to abatement pursuant to MCL 600.3825; MSA 27A.3825. The circuit court declared the

car to be a nuisance and abated the nuisance, terminating defendants' interest in the automobile.

Defendants first contend that they were entitled to summary disposition pursuant to MCR 2.116(C)(8) because plaintiff failed to demonstrate that defendant Tina Bennis had knowledge that her husband, defendant John Bennis, was using the vehicle that the two jointly owned for purposes of lewdness, assignation, or prostitution. We agree that the prosecution was obligated to demonstrate that defendants knew of the use of the vehicle as a nuisance before the nuisance could be ordered abated.

The statutes relating to public nuisance provide for declaring certain property to be a nuisance where "lewdness, assignation or prostitution or gambling" take place on that property. MCL 600.3801; MSA 27A.3801 provides, in pertinent part:

> Any building, vehicle, boat, aircraft, or place used for the purpose of lewdness, assignation or prostitution or gambling, or used by, or kept for the use of prostitutes or other disorderly persons, . . . is declared a nuisance, . . . and all . . . nuisances shall be enjoined and abated as provided in this act and as provided in the court rules. Any person or his or her servant, agent, or employee who owns, leases conducts, or maintains any building, vehicle, or place used for any of the purposes or acts set forth in this section is guilty of a nuisance.

The prosecuting attorney, among others, is authorized to bring an action for equitable relief to abate a

nuisance pursuant to MCL 600.3805; MSA 27A.3805. MCL 600.3825; MSA 27A.3825 provides for the issuance of an order of abatement and sale of property found to be a nuisance, including vehicles.

MCL 600-3815(2); MSA 27A.3815(2) provides that "proof of knowledge of the existence of the nuisance on the part of the defendants or any of them, is not required." The Michigan Supreme Court, however, has held that, regardless of this statutory language, proof of knowledge is required for abatement. In *People v Shoonmaker*, 241 Mich 177, 181; 216 NW 456 (1927), our Supreme Court stated:

> Defendants did not maintain a nuisance unless they permitted such illegal use of the premises; that is, consented to it or acquiesced, and whether they did so was a question of fact, not established by efforts to prevent misuse of the premises but only by some evidence disclosing permissive use. . . . That transgressions may happen is possible, but remain offenses of the wrongdoer unless tolerated by the occupant to the extent of permissive use of the premises for such purpose or indifference thereto. The statute does not deprive one person of the use of his property by reason of the illegal acts of another, unless the owner's use bears a participating relation to the violation.

Subsequent decisions of our Supreme Court have held that the statute obviates the need for proof of knowledge, and apparently ignore *Schoonmaker*, as noted by this Court in *State ex rel Oakland Co Prosecutor v Motorama Motel Corp*, 105 Mich App 224, 228; 307 NW2d 349 (1981). See *People ex rel Wayne Prosecuting Attorney v Bitonti*, 306

Mich 115, 119; 10 NW2d 329 (plurality) (1943); *People ex rel Wayne Prosecuting Attorney v Tate*, 306 Mich 667, 669; 11 NW2d 282 (1943); *State ex rel Attorney General v Robinson*, 250 Mich 99, 103; 229 NW 403 (1930). The *Schoonmaker* view has recently received support, however, in *State ex rel Wayne Co Prosecuting Attorney v Levenburg*, 406 Mich 455, 462, n 1; 280 NW2d 810 (1979), in which our Supreme Court stated in dicta "However, we acknowledge that a judgment for abatement in a prosecution of this nature cannot be rendered without a finding of knowledge of the accosting and soliciting on the part of the owners or operators of the place found to be a nuisance and their acquiescence in those activities."

Considering that *Shoonmaker* has never been expressly overruled, and in light of the comment in *Levenburg*, we follow the *Schoonmaker* analysis, as this Court did in *Motorama, supra*, and *State ex rel Wayne Prosecuting Attorney v Weitzman*, 21 Mich App 705, 710-711; 176 NW2d 463 (1970). We therefore hold that the prosecutor was required to prove that defendants knew that their vehicle was being used for a purpose set forth in MCL 600.3801; MSA 27A.3801. We further hold that the record in this case does not support a finding that Mrs. Bennis knew that the vehicle was being used for such purpose.

Defendants next contend that the vehicle could not be abated because only one incident of lewdness, assignation, or prostitution was alleged before the trial court, and that this is insufficient to demonstrate a nuisance. We agree. In *Motorama*, the plaintiff alleged that on one occasion, a police officer was accosted and solicited by an unknown female at a bar who then took him across the

street to the defendant hotel. The trial court granted the defendant hotel summary disposition, holding in part that the one instance of lewdness and assignation alleged by the plaintiff was insufficient to support a claim of nuisance. This Court affirmed, holding that a single alleged incident is insufficient to create a nuisance unless circumstances are such that would permit the reasonable inference that the conduct was habitual. *Id.*, 229-230; see also *Bitonti, supra*, 119-120 (Justice Chandler). The facts in *Motorama* were insufficient to permit such an inference, even though the affidavit of the police officer in question stated that there had been numerous arrests of females in that area for solicitation at the bar across from the defendant hotel. *Id.*, 226, 229-230.

The *Motorama* approach best effectuates the purpose of the statute. The abatement statute was enacted to subject houses of prostitution to abatement as nuisances. *State ex rel Wayne Co Prosecutor v Diversified Theatrical Corp*, 396 Mich 244, 246-250; 240 NW2d 460 (1976). The purpose of the act has also been described as eliminating the use of property in connection with gambling, prostitution, and the illicit sale of liquor. *People ex rel Wayne Prosecuting Attorney v Sill*, 310 Mich 570, 575; 17 NW2d 756 (1945); *People ex rel Oakland Prosecuting Attorney v Ginell*, 159 Mich App 679, 681-682; 407 NW2d 59 (1987). The statute is not intended to regulate the morality of individuals, nor to prevent incidents of immorality in, for example, hotels that are otherwise respectable establishments. See *Diversified Theatrical Corp, supra*, 247.

As in *Motorama*, we hold that a single incident is insufficient to establish a nuisance. Further, the circumstances of this case do not permit the reasonable inference

that the conduct was habitual. In this case, the prosecution has alleged only a single incident to support the contention that defendants' car was a nuisance. While the prosecution at length discusses the reputation and record of Kathy Palarchio, the woman found in the car with Mr. Bennis, this does not establish that defendants' car was used on more than that occasion for lewdness, assignation, or prostitution. Similarly, testimony was presented that Mr. Bennis was seen on more than one occasion driving in that area and talking to women. Not only does this observed conduct not prove that defendant was involved in lewdness, assignation, or prostitution, there was no evidence to establish that this conduct, if it occurred, took place in the vehicle in question. In fact, defendants allegedly purchased the car only three weeks before the incident which gave rise to this action.

The dissent in this case states that the transient nature of a vehicle, as compared to real property, justifies finding the vehicle to be a nuisance upon the proof of only one incident of prohibited conduct. The dissent reasons that to require proof that the vehicle was used on more than one occasion for a purpose proscribed by the statute would thwart the purpose of the public nuisance statute. While the prohibited conduct would indeed have to be observed on more than one occasion, that is the very nature of a nuisance. *Motorama, supra,* 229-230. In fact, if conduct happens so rarely that authorities investigating the situation are unable to observe a recurrence of the conduct, we would hesitate to find a nuisance. Just as one incidence of prostitution does not create a brothel out of a family hotel, neither does one isolated incidence of

prohibited conduct in a vehicle necessarily cause the vehicle to be a nuisance.

Defendants further contend that the prosecution failed to demonstrate that an act of lewdness, assignation, or prostitution occurred in the car and that the abatement provisions are therefore inapplicable. We agree. After the incident in question, Mr. Bennis was apparently charged with one court of gross indecency pursuant to MCL 750.338b; MSA 28.570(2).[1] The record indicates that Mr. Bennis was found in the car in an area apparently known for prostitution, engaged in sexual activity with a woman previously arrested for prostitution. Defendant was only charged with gross indecency, however, presumably because there was no proof that the activities in which Mr. Bennis and Ms. Palarchio engaged were in exchange for payment.

Our Supreme Court in *Levenburg* noted that while assignation is generally defined as an appointment for a meeting, especially between lovers, the term as used in the abatement act is limited to the making of an appointment for purposes of prostitution. *Levenburg, supra,* 465-466. Similarly, while lewdness may be defined more

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[1] The complaint alleges that Mr. Bennis was charged with "indecent and immoral conduct." The complaint further alleges that "the observed conduct is a violation of MCLA 750.449a, engaging the services of a prostitute and MCLA 750.338b, gross indecency between male and female." The prosecution agrees in its brief on appeal, however, that defendant John Bennis was charged only with gross indecency, and further admits that there is no evidence that Mr. Bennis paid or intended to pay Ms. Palarchio.

broadly in the common sense of the word, in the abatement act, the term is confined to acts of prostitution. See *Diversified Theatrical Corp, supra,* 246-250. This construction of the terms is sensible, considering that the purpose of the statute is to eliminate repeated prostitution in a specific location. Thus while Mr. Bennis' conduct in his car may have been lewd or may have been an assignation in a general sense, there is no demonstration that the conduct was that prohibited by the statute, absent proof that the sexual activity was in exchange for money.[2]

Reversed.

/s/ William B. Murphy
/s/ Marilyn Kelly

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[2] Nor is Mr. Bennis' conduct included within the nuisance statute merely because his conduct can be equated with gross indecency, and was therefore arguably disorderly. See *Diversified Theatrical Corp, supra,* 246, 250; *State ex rel Oakland Prosecuting Attorney v Alray Northcrest Plaza,* 146 Mich App 595, 602-604; 381 NW2d 731 (1985).

STATE OF MICHIGAN

COURT OF APPEALS

STATE OF MICHIGAN, EX REL JOHN D. O'HAIR, PROSECUTING ATTORNEY FOR THE COUNTY OF WAYNE,

Plaintiff-Appellee,

v

JOHN CHARLES BENNIS and TINA B. BENNIS,

Defendants-Appellants.

No. 132568

LC No. 88-824379 CZ

Before: Jansen, P.J., and Murphy and Marilyn Kelly, JJ.

JANSEN, J. (dissenting).

I respectfully dissent. I would affirm the November 16, 1988, judgment entered by the Wayne Circuit Court declaring defendants' 1977 Pontiac automobile to be a nuisance and abating their interest in the automobile.

Defendants contend that the trial court erred in denying their motion for summary disposition brought pursuant to MCR 2.116(C)(8). Specifically, defendants argue that plaintiff's complaint failed to allege more than one isolated instance of using the 1977 automobile for purposes of lewdness, assignation, or prostitution and, the complaint failed to allege knowledge of, consent to, or acquiescence in the alleged nuisance by Tina Bennis. I disagree with defendants.

A motion for summary disposition based on a failure to state a claim upon which relief may be granted is to be tested by reference to the pleadings alone, and all well-pled material allegations must be taken as true. *State ex rel Oakland County Prosecutor v. Motorama Motel Corp*, 105 Mich App 224, 226; 307 NW2d 349 (1981). The standard is whether the plaintiff's claims are so clearly unenforceable as a matter of law that no factual development could possibly justify a right to recovery. *Id.*

Defendants maintain that plaintiff's complaint was insufficient because it failed to allege that Tina Bennis had knowledge of, consented to, or acquiesced in the use of the automobile by her husband to create a nuisance. The majority held that "the prosecution was obligated to *demonstrate* that defendants knew of the use of the vehicle as a nuisance before the nuisance could be ordered abated." (Emphasis added.) I disagree.

It is not disputed that Tina Bennis and John Bennis are co-titled owners of the 1977 automobile. MCL 600.3815(2); MSA 27A.3815(2) specifically and unambiguously provides that "[p]roof of knowledge of the existence of the nuisance on the part of the defendants or any of them, is not required." The statute expressly obviates the necessity of proof of knowledge of the existence of the nuisance on the part of defendants. *People ex rel Wayne Prosecuting Attorney v Bitonti*, 306 Mich 115, 119, 121; 10 NW2d 329 (1943); *State ex rel Attorney General v Robinson*, 250 Mich 99, 103; 229 NW 403 (1930). But see *People v Schoonmaker*, 241 Mich 117; 216 NW 456 (1927); *State ex rel Wayne Prosecuting Attorney v Weitzman*, 21 Mich App 705; 176 NW2d 463 (1970). "Obviously, where proof of knowledge is unnecessary, allegations of the

owner's knowledge are not required to state a statutory cause of action." *State ex rel Oakland County Prosecutor v Weaver*, 74 Mich App 462, 464; 254 NW2d 68 (1977).

I recognize that our Supreme Court has held, as noted by the majority, that proof of knowledge is required for abatement. *Schoonmaker, supra*. However, I also recognize that subsequent decisions of the Supreme Court have held that the statute, MCL 600.3815(2); MSA 27A.3815(2), obviates the need for proof of knowledge. *Bitonti, Robinson, supra*. See also *People ex rel Wayne Prosecuting Attorney v Tate*, 306 Mich 667, 669; 11 NW2d 282 (1943). Given the clear, unambiguous language of the statute, I am convinced that *Bitonti, Tate, Robinson*, and *Weaver* are correct. I would hold that plaintiff was not required to allege knowledge on the part of Tina Bennis.

Defendants also claim that plaintiff failed to allege more than one isolated instance of use of the 1977 automobile for the purpose of lewdness, assignation, or prostitution. I would hold that plaintiff was not required to allege more than one use of the vehicle for the purposes proscribed in the statute.

Because of the unique characteristics of an automobile, and in particular the mobility of such, I would follow the opinion of Justice Bushnell in *Bitonti, supra*. In *Bitonti*, the Court held "that proof of only one isolated instance of violation of the statute was sufficient." *Id.*, p 122. I am convinced that this is the proper interpretation to be given the public nuisance statute when a vehicle is used for the purpose of lewdness, assignation, or prostitution. The statute specifically provides that any vehicle used for the purpose of lewdness, assignation, or

prostitution is declared a nuisance. MCL 600.3801; MSA 27A.3801. The statute does not require protracted use of the vehicle for purposes of lewdness, assignation, or prostitution, and in a case such as this, where the automobile is used as an indispensable part of the statutory violation, I would hold that a single incident is sufficient to sustain a finding of nuisance.

I am mindful that cases such as *Motorama Motel Corp* have held that a "nuisance involves the notion of repeated or continuing conduct and should not be based upon proof of a single isolated incident unless the facts surrounding the incident permit the reasonable inference that the prohibited conduct was habitual in nature." *Id.*, pp 229-230. However, *Motorama Motel Corp* involved a police officer who was accosted and solicited by a female at the Last Chance Bar and was then taken across the street to the defendant motel by the female. *Id.*, p 225. The officer's affidavit indicated that the motel was only utilized on a single occasion. *Id.*, p 230.

Given the obvious and inherent differences between a stationary or fixed building or structure and a transient or mobile vehicle, it is my opinion that the better reasoned rule allows a finding of public nuisance based on a single instance of conduct involving the use of a vehicle for this purpose of lewdness, assignation, or prostitution. A building or fixed structure may be subject to continuous surveillance for the purpose of determining whether the premises are continuously or repeatedly being used for the purpose of lewdness, assignation, or prostitution. However, when a vehicle is used for any of the purposes set forth in MCL 600.3801; MSA 27A.3801, the authorities would have to determine that the same car was being

used on a continuous or repeated basis for purposes proscribed by the statute. Because of the mobility of a vehicle, this would surely be a prohibitive task.

As the majority notes, the purpose of the statute is to eliminate the use of property in connection with gambling, prostitution, and the illicit sale of liquor. *People ex rel Wayne Prosecuting Attorney v Sill* 310 Mich 570, 575; 17 NW2d 756 (1945); *People ex rel Oakland Prosecuting Attorney v Ginell*, 159 Mich App 679, 681-682; 407 NW2d 59 (1987). To require plaintiff to prove that the same vehicle was used on numerous occasions for purposes proscribed by the statute would thwart the purpose behind the public nuisance statute.

Defendants also argued that the trial court erred in finding that a public nuisance existed where the evidence failed to show; that John Bennis engaged in more than one isolated instance of proscribed conduct. Defendants further argue that there was no evidence presented to establish that Bennis paid Palarchio for performing the sexual act and that the conduct between Bennis and Palarchio was consensual.

As I have stated above, it is my opinion that when a vehicle is used for the purpose of lewdness, assignation, or prostitution, proof of a single instance of conduct will support a finding that the vehicle constitutes a public nuisance pursuant to MCL 600.3801; MSA 27A.3801. Additionally, I am convinced that sufficient evidence was presented to establish that the vehicle was used for the purpose of lewdness, assignation, or prostitution.

In *State ex rel Macomb Prosecuting Attorney v Mesk*, 123 Mich App 111; 333 NW2d 184 (1983), this Court noted

that the Supreme Court, in *State ex rel Wayne Prosecuting Attorney v Diversified Theatrical Corp*, 396 Mich 244; 240 NW2d 460 (1976), found the meaning of the terms lewdness, assignation, and prostitution, as used in the abatement statute, to be clear. *Mesk*, p 116. Although the Court in *Diversified Theatrical Corp* did not expressly define the terms, it quoted from *Chicago v Geraci*, 30 Ill App 3d 699, 703; 332 NE2d 487 (1975), as follows:

> However, we find no confusion in the meaning of these terms. Although traditionally the term "lewdness" is viewed as being broader than and including the term "prostitution," such terms refer to the same general class of activities which are normally associated with houses of prostitution (or whatever such establishments may be called). They are intended to designate and prohibit sex acts of whatever nature which are performed for money. 396 Mich 250, fn 13. [*Mesk*, p 116.]

The majority states that John Bennis was apparently only charged with one count of gross indecency, MCL 750.3386; MSA 28.570(2), "presumably because there was no proof that the activities in which Mr. Bennis and Ms. Palarchio engaged were in exchange for payment." However, a review of plaintiff's complaint reveals that Bennis and Palarchio were arrested and charged with indecent and immoral conduct, specifically, engaging the services of a prostitute, MCL 750.449a; MSA 28.704(1), and gross indecency between male and female persons, MCL 750.3386; MSA 28.570(2).

Testimony indicated that on March 3, 1988, John Bennis was driving home from work in the 1977 Pontiac automobile. Bennis stopped the car at the corner of Eight

Mile and Sheffield where a young woman, Palarchio, was standing. At the time Bennis stopped his vehicle, he was being observed by two Detroit Police Officers who were working undercover for the vice squad.

Prior to Bennis stopped his vehicle, the officers observed Palarchio "flagging" cars in an effort to get them to stop. When Bennis stopped his vehicle, Palarchio walked to the passenger's side and entered the car. Bennis drove down the street, made a U-turn, pulled along the road and stopped, turning off his headlights.

The officers followed Bennis in his vehicle, and they parked approximately three car lengths behind the 1977 Pontiac. Officer Anthony testified that he say two heads in the car, a female head on the right side and a male head on the left. Immediately after the officers parked their vehicle, the female head disappeared towards the driver's side of the car. The officers approached the vehicle and observed Palarchio performing an act of fellatio on Bennis.

Officer Anthony testified that it was a known fact that Palarchio has been working as a prostitute. She had been arrested many times before on charges of accosting and soliciting, indecent and obscene conduct, and disorderly conduct. Palarchio has also been arrested for "flagging" vehicles in an attempt to get them to stop.

I would find that the above evidence was sufficient to support a finding that John Bennis used his vehicle for the purpose of lewdness, assignation, or prostitution. The trial court could properly infer from all of the evidence presented that John Bennis, whole occupying the 1977 Pontiac, engaged the services of Palarchio for the purpose

of engaging in lewdness, assignation, or prostitution. Clearly, prostitution includes an act of fellatio. *Mesk*, p 117.

Additionally, the trial court did not err by ordering abatement of the vehicle and extinguishing the proprietary interest of the innocent spousal co-owner, Tina Bennis. As noted above, MCL 600.3815(2); MSA 27A.3815(2) obviated the requirement of proof of a defendant's knowledge of the existence of the nuisance. *Tate, Bitonti, Robinson, Weaver, supra*. Plaintiff was not required to show knowledge on the part of Tina Bennis.

I would affirm the judgment of the trial court declaring defendants' 1977 Pontiac automobile to be a nuisance and abating their interest in the automobile.

/s/ Kathleen Jansen

Opinion

FILED DECEMBER 29, 1994

PEOPLE OF THE STATE OF MICHIGAN ex rel WAYNE COUNTY PROSECUTOR,

Plaintiff-Appellant,

No. 97339

v

JOHN C. BENNIS and TINA B. BENNIS,

Defendants-Appellees.

BEFORE THE ENIRE BENCH

RILEY, J. In this case, we are required to construe various aspects of the nuisance abatement statute, MCL 600.3801; MSA 27A.3801.[1] Specifically, we must decide

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[1] Any building, vehicle, boat, aircraft, or place used for the purpose of lewdness, assignation or prostitution or gambling, or used by, or kept for the use of prostitutes or other disorderly persons, or used for the unlawful manufacture, transporting, sale, keeping for sale, bartering, or furnishing of any controlled substance as defined in section 7104 of the public health code, Act No. 368 of the Public Acts of 1978, being section 333.7104 of the Michigan Compiled Laws, or of any vinous, malt, brewed, fermented, spirituous, or intoxicating liquors or any mixed liquors or beverages, any part of which is intoxicating, is declared a nuisance, and the furniture, fixtures, and contents of the building, vehicle, boat, aircraft, or place and all intoxicating liquors therein are also declared a nuisance, and all controlled substances and nuisances shall be enjoined and abated as provided in this act and as provided in the court rules. Any

whether an act of prostitution was consummated absent proof that money was exchanged. Next, we must determine whether the trial court erred in abating a vehicle used to commit an act of prostitution in a neighborhood with a reputation for illicit activity. Finally, we must consider whether a co-owner's interest in a vehicle may be abated where the co-owner allegedly had no knowledge that the vehicle was used in proscription of the statute.

We would hold that lewdness, incidental to an act of prostitution, is activity squarely within the purview of the nuisance abatement statute. Alternatively, we conclude that proof of an exchange of money is not necessary where, as here, it is clear from the totality of circumstances that the sexual act was in exchange for payment. Additionally, we would uphold the abatement of this vehicle because the defendant entered a neighborhood that is a known place for prostitution and used his vehicle to engage in illicit activity, thereby contributing to the existing nuisance. Finally, pursuant to the clear and unambiguous language of the statute, we would hold that knowledge or consent is not required to abate the interest of a co-owner.

I

John Bennis was arrested for gross indecency on the evening of October 3, 1988. On that evening, Detroit

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person or his or her servant, agent, or employee who owns, leases, conducts, or maintains any building, vehicle, or place used for any of the purposes or acts set forth in this section is guilty of a nuisance.

police officers Jacob Anthony and John Howe set up surveillance after they witnessed a woman "flagging"[2] passing vehicles on the corner of Eight Mile and Sheffield. The woman was later identified as Kathy Polarchio. The officers next observed a 1977 Pontiac, driven by a man, later identified as John Bennis, turn onto Sheffield and stop near Ms. Polarchio, who approached and entered the passenger side of the Pontiac. The officers followed the Bennis vehicle, which proceeded a block, made a U-turn, and stopped. Surveillance continued until the officers noticed Ms. Polarchio's head disappear toward the driver's side of the Pontiac. The officers immediately approached the Bennis vehicle, shined a flashlight into the front seat, and witnessed Ms. Polarchio performing an act of fellatio on Mr. Bennis.

Mr. Bennis was convicted of gross indecency in violation of MCL 750.338b; MSA 28.570(2).[3] The Wayne County prosecutor then filed a complaint alleging that the Bennis vehicle was a public nuisance subject to abatement pursuant to MCL 600.3801; MSA 27A.3801. The vehicle was co-owned by Mr. Bennis' wife, Tina Bennis, who claimed that she had no knowledge that her husband ever used their vehicle in violation of the statute. The trial judge held that the vehicle was a nuisance and abated the interest of defendant and his wife.

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[2] "Flagging" is the manner in which prostitutes solicit business from potential customers in passing vehicles.

[3] Ms. Polarchio was arrested the next day for accosting and soliciting. She had formerly been arrested on several occasions for disorderly conduct, accosting and soliciting, and indecent and obscene conduct.

The Court of Appeals reversed the decision of the trial court,[4] holding first that the prosecution had an obligation under *People v Schoonmaker*, 241 Mich 177; 216 NW 456 (1927), to demonstrate that Mr. Bennis' wife knew that he used the vehicle in a manner proscribed by the statute and failed to offer such proof.[5] The Court of Appeals next held that under *State ex rel Oakland Co Prosecutor v Motorama Motel Corp*, 105 Mich App 224; 307 NW2d 349 (1981), proof of a single incident of lewdness, assignation, or prostitution is insufficient to establish a nuisance. Finally, the Court of Appeals held that the prosecution failed to demonstrate that an act of lewdness, assignation, or prostitution occurred.

We granted leave to appeal[6] and now reverse the decision of the Court of Appeals.

II

We turn first to whether the act committed in the Bennis vehicle is within the purview of the nuisance abatement statute. Consistent with the 1909 Iowa "red light abatement acts," upon which the Michigan statute is based,[7] the Michigan statute requires that the act be one

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[4] 200 Mich App 670; 504 NW2d 731 (1993).

[5] *Schoonmaker* was based on a predecessor statute, 1925 PA 389; however, the relevant language is virtually identical to the present statute. See n 24.

[6] 445 Mich 861 (1994).

[7] *State ex rel Wayne Co Prosecutor v Diversified Theatrical Corp*, 396 Mich 244, 246; 240 NW2d 460 (1976).

of "lewdness, assignation *or* prostitution."[8] In *State ex rel Wayne Co Prosecuting Attorney v Levenburg*, 406 Mich 455; 280 NW2d 810 (1979), this Court used the rule of construction, *noscitur a sociis*, to define assignation in the statute.[9] The Court upheld the abatement of a bar because it was used for accosting and soliciting acts of prostitution. In other words, "the making of an appointment for the purpose of prostitution" constituted assignation under the statute. *Id.* at 466. *Levenburg* based its decision on *State ex rel Wayne Co Prosecutor v Diversified Theatrical Corp*, 396 Mich 244, 246-250; 240 NW2d 460 (1976). *Diversified* essentially held that while lewdness, assignation, and prostitution are set forth in the alternative, the conduct constituting lewdness or assignation must be incidental to or in furtherance of an act of prostitution.[10]

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[8] See n 1 (emphasis added).

[9] The doctrine should be applied where legislative intent is not clear, so that "when two or more words are grouped together, and ordinarily have a similar meaning, but are not equally comprehensive, the general word will be limited and qualified by the special word." 2A Singer, Sutherland Statutory Construction (5th ed), § 47.16, p 183. See also *Williams & Works, Inc v Springfield Corp*, 408 Mich 732, 746; 293 NW2d 304 (1980).

[10] *Diversified* relied on *State v Morley*, 63 NM 267, 270-271; 317 P2d 317 (1957), which stated "we are led to believe that the legislature intended 'lewdness' to be limited to acts in connection with 'assignation' or 'prostitution' " and further noted that "[t]he term 'lewdness' is a broader and more general term than 'assignation' or 'prostitution.' " See also *State ex rel Oakland Prosecuting Attorney v Ginell*, 159 Mich App 679, 681; 407 NW2d 59 (1987), in which the Court of Appeals held that the activity must not be consensual in nature, whether lewd, obscene, or disorderly; *State ex rel Wayne Co Prosecuting Attorney v Dizzy Duck*, 203 Mich App 250, 260; 511 NW2d 907 (1994), where the

In the instant case, the prosecution maintains that an act of lewdness, within the context of the nuisance abatement statute, occurred. Although this aspect of the statute has yet to be defined,[11] we agree with the contention put forth by the prosecution.

We analogize the definition of "assignation" in *Levenburg* with the definition we now give to "lewdness." *Levenburg* looked to the common meaning of "assignation" and concluded that the common definition of the term is limited to those instances in which the act of assignation is "for the purpose of prostitution." *Id.* at 466. In this manner, the common definition of "lewdness" includes a lustful and obscene display of illicit sexual activity.[12] Utilizing the common meaning of "lewdness,"[13] we also conclude that it is limited to those

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Court of Appeals concluded that lewdness "as used in the nuisance abatement statute, refers to those sexual acts . . . performed on another where done for hire."

[11] In *Diversified*, we did not define lewdness, but simply held that no interest was abatable because the conduct was unrelated to live acts of prostitution on the premises.

[12] See also 50 Am Jur 2d, Lewdness, Indecency, Etc, § 1, pp 450-451:

> Lewdness has been defined as the unlawful indulgence of lust. It signifies that form of immorality which has relation to sexual impurity, and is generally used to indicate gross indecency with respect to the sexual relations. Illicit intercourse may under some circumstances constitute lewdness, but there may also be lewdness without any such act.

[13] The *Random House College Dictionary of the English Language: Unabridged Edition* defines "lewd" as:

> 1. inclined to, characterized by, or inciting to lust or lechery; lascivious. 2. obscene or indecent, as

instances in which an act of lewdness occurs in furtherance of or for the purpose of prostitution.

This result is consistent with Michigan decisions in *Diversified* and *Levenburg, supra*, as well as other jurisdictions interpreting similar language.[14] For example, in *Pennsylvania v MacDonald*, 464 Pa 435, 460-461; 347 A2d 290 (1975), the court addressed the issue of lewdness and concluded:

> Far more important than mere dictionary definitions is the statutory context in which the word "lewdness" appears. . . . That context proscribes use of any building "for the purpose of fornication, . . . assignation, and/or prostitution." All of these forbidden purposes involve illicit sexual *conduct*, thus strongly indicating a legislative intention to proscribe only purposes of this type when it used the word "lewdness." Such a construction has the further advantage of obviating any problems of vagueness which might be entailed by construing the term "lewdness" in a broader fashion. [Emphasis supplied.]

In the case at bar, Mr. Bennis' conduct constitutes lewdness because it occurred in a residential neighborhood and was in furtherance of an act that traditionally forms the basis of a prostitution charge, i.e., fellatio.[15]

> language or songs; salacious. 3. Obs. a. low, ignorant, or vulgar. b. base, vile, or wicked, esp. of a person. c. bad, worthless or poor, esp. of a thing.

[14] See *Levenburg* and *Diversified* and cases cited therein.

[15] We do not decide whether property may be abated for an act of lewdness where the conduct is not that which traditionally forms a charge of prostitution.

This result is consistent with the definition of assignation in *Levenburg, supra,* at 466. Indeed, we find particularly persuasive the fact that Mr. Bennis engaged in this act with a known prostitute in an area reputed for illicit activity.[16] Therefore, while no money was exchanged, the conduct clearly satisfies statutory requirements and is subject to abatement.

Moreover, even if we did not find the conduct lewd within the meaning of the nuisance abatement statute, we are persuaded that from the totality of the circumstances, an act of prostitution occurred. We primarily rely on the uncontroverted testimony of Detroit police officer Jacob Anthony who, along with his partner, witnessed Ms. Polarchio "flagging"[17] passing vehicles on Eight Mile and Sheffield. His testimony is a compelling indication that an act of prostitution occurred. As previously stated, the officers witnessed the Bennis vehicle stop in response to Ms. Polarchio's "flagging" and saw her enter the vehicle posthaste. The vehicle proceeded and within minutes again came to a stop. Ms. Polarchio's head immediately disappeared, and the officers then observed the two engaged in fellatio. The dissent fails to address this most persuasive testimony.

We are additionally persuaded by the following facts which support our conclusion. One witness, Sammie Parham, a security guard at a business located at Six Mile and Woodward, testified that he had seen Mr. Bennis in

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[16] The record is devoid of any evidence that Mr. Bennis raised in his defense that this activity was consensual or that he and Ms. Polarchio had some prior relationship.

[17] See n 2.

the area during the summer before Bennis' October 3, 1988, arrest. Mr. Parham saw Mr. Bennis talking to a prostitute on two separate occasions and ushered the prostitutes away in both instances just as they were about to enter the Bennis vehicle.

Furthermore, it is uncontested that Ms. Polarchio had been arrested several times for solicitation and disorderly conduct. The arresting officer testified that Mr. Bennis stopped at the waving, or what he perceived to be the "flagging," by Ms. Polarchio. Additionally, we are persuaded by Mr. Bennis' admission at trial that he normally proceeds home across Eight Mile and turns north onto Woodward. It is uncontested that on the evening in question, Mr. Bennis drove down Eight Mile and proceeded *south* on Sheffield, the opposite direction of his home. It is also undisputed that minutes after he turned onto Sheffield and picked up Ms. Polarchio, two officers found them engaged in fellatio.

While the officers did not actually witness an exchange of money, from the testimony elicited at trial, a clear inference may be drawn that the sexual act was in exchange for monetary compensation. In his defense, Mr. Bennis has not asserted that he and Ms. Polarchio had a relationship or even knew one another, precluding any inference that the act was consensual, rather than for hire. We do not shift the burden of proof to defendant on this issue. We clearly have sufficient testimony on the record which supports that an act of prostitution occurred. We merely find it noteworthy that, as a matter of fact, Mr. Bennis has not asserted in his defense that there was a prior or existing relationship between himself and Ms. Polarchio.

In sum, we are persuaded by the testimony of the officer witnessing the act and the stated additional facts that augment our decision. Under these circumstances, proof of an actual exchange of money is not required. An action will not be denied merely because the witnessing officers do not allow the illicit activity to proceed to the point where money is exchanged. We therefore conclude that the Court of Appeals erred in holding that the prosecution failed to demonstrate that an act of lewdness, assignation, or prostitution occurred in the Bennis vehicle.

III

As noted above, MCL 600.3801; MSA 27A.3801 provides for the abatement of a vehicle used for the purpose of lewdness, assignation, or prostitution. However, the statute does not define the extent of activity required to constitute a nuisance. Therefore, we must next determine whether an act of prostitution committed in a neighborhood known for illicit activity is within the purview of the statute.

A

Although the issue has not been resolved by appellate decisions of this state, an attempt was made to clarify the definition of nuisance in *Motorama Motel, supra.* Citing *People ex rel Wayne Prosecuting Attorney v Bitonti,* 306 Mich 115; 10 NW2d 329 (1943), *Motorama* held that "[a] nuisance involves the notion of repeated or continuing conduct and should not be based upon proof of a single

isolated incident unless the facts surrounding that incident permit the reasonable inference that the prohibited conduct was habitual in nature." *Id.* at 229-230. However, *Motorama's* reliance on *Bitonti* is belied by the fact that only four of the eight justices in *Bitonti* held that a single act was sufficient to constitute an abatable nuisance.[18]

As a result, existing Michigan precedent does not specifically require more than a single incident of conduct. However, cognizant of the activity that has implicitly constituted a nuisance in previous actions,[19] we must

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[18] Four justices held that a single act was sufficient, three held it was not, and one concurred in the reversal of the abatement but "without expressing the opinion that proof of a single violation would be insufficient to establish the existence of a nuisance under all circumstances." *Id.* at 120.

[19] We acknowledge that many abatement cases in this state based on identical predecessor statutes involved a nuisance where more than a single act of conduct was proved or could be inferred. *People ex rel Wayne Prosecuting Attorney v Sill,* 310 Mich 570, 572; 17 NW2d 756 (1945), abated the interest of a vehicle where proof was submitted that the owner was engaged in the "numbers racket" and had in his possession a number of betting slips. *State ex rel Wayne Prosecuting Attorney v Martin,* 314 Mich 317, 322; 22 NW2d 381 (1946), held that "[t]he testimony of defendant would of itself be a sufficient basis for the court's finding that defendant had used the automobile in question on the very day of his arrest and the preceding day for the illegal purposes [gambling] claimed by plaintiff" and therefore was abatable pursuant to the nuisance abatement statute. *Levenburg, supra* at 466-467, upheld the abatement of a Detroit bar where there was testimony that prostitutes frequently solicited customers to perform sexual acts elsewhere. In *State ex rel Macomb Co Prosecuting Attorney v Mesk,* 123 Mich App 111, 123; 333 NW2d 184 (1983), the Court relied on *Motorama,* requiring that the prosecution establish that the nuisance was continuing in

determine whether the activity in this case properly falls within the definition of nuisance as used in MCL 600.3801; MSA 27A.3801.

B

Because the public nuisance statute allows the abatement of property used in a proscribed manner without specifying the activity that will constitute a nuisance, we are aided in the definition of a nuisance by general public nuisance law. This Court has defined a public nuisance as involving "not only a defect, but threatening or impending danger to the public. . . . " *Kilts v Kent Co Bd of Supervisors*, 162 Mich 646, 651; 127 NW 821 (1910). Similarly, this Court has declared a public nuisance where an act "offends public decency." *Bloss v Paris Twp*, 380 Mich 466, 470; 157 NW2d 260 (1968).[20] Finally, *Garfield Twp v Young*, 348 Mich 337, 342, 82 NW2d 876 (1957), held that to constitute a nuisance

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nature. A continuing nuisance was established where four undercover police officers made separate visits to a massage parlor over a nine-month period and each time a model agreed to perform sexual services.

[20] In *Bloss, supra*, this Court upheld the lower court's injunction of the operation of an outdoor theater showing explicit movies where neighborhood children could view the films from outside the drive-in. *Id.* at 468-469. The Court held: "It is our judgment that the foisting off of a display of pictures not fit for children to see onto places within their view on public streets, on residential properties and in private homes, without the consent of the property owners and the parents, is a public nuisance." *Id.* at 470.

> the activity must be harmful to the public health, or create an interference in the use of a way of travel, or affect public morals, or prevent the public from the peaceful use of their land and the public streets. [Citations omitted.]

The rationale is that a nuisance involves a continuing detrimental effect on the public. The nuisance abatement statute serves the same general purpose. Therefore, mindful of the activity that generally constitutes a public nuisance, we apply these principles to the context of the nuisance abatement statute.

C

In construing the nuisance abatement statute, "effect must be given, if possible, to every word, sentence and section." *Grand Rapids v Crocker*, 219 Mich 178, 182; 189 NW 221 (1922). Moreover, to discover the legislative intent, "the entire act must be read, and the interpretation to be given to a particular word in one section arrived at after due consideration of every other section so as to produce, if possible, a harmonious and consistent enactment as a whole." *Id.* at 182-183. However,

> [w]here the language of a statute is of doubtful meaning, a court must look to the object of the statute in light of the harm it is designed to remedy, and strive to apply a reasonable construction that will best accomplish the Legislature's purpose. [*Marquis v Hartford Accident & Indemnity*, 444 Mich 638, 644; 513 NW2d 799 (1994) (citations omitted).]

Pursuant to these rules of construction, we consider MCL 600.3815; MSA 27A.3815 in our analysis of whether an abatable nuisance exists. The section provides:

> In any action brought under this chapter, evidence of the general reputation of the building, vehicle, boat, aircraft *or* place is admissible for the purpose of proving the existence of the nuisance. [Emphasis added.]

The nuisance abatement statute's use of the disjunctive "or" allows us to consider the reputation of the vehicle *or* the place to determine whether a nuisance exists. The *Random House College Dictionary* defines "place" as "an open space, or square, in a city or town," "a short street, court," and "an area of habitation, as a city, town, or village." Given the unique facts in this case, we focus on the word "place" set forth in MCL 600.3815(1); MSA 27A.3815(1). We conclude that the word "place" may encompass a neighborhood, and we therefore consider the general reputation of the area surrounding the Eight Mile and Sheffield intersection for purposes of determining the existence of a nuisance.[21]

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[21] See *State ex rel Wayne Co Prosecuting Attorney v Bernstein*, 57 Mich App 204, 206; 226 NW2d 56 (1974), upholding the abatement of a bar under M.C.L. 600.3801; M.S.A. 27A.3801 where "officers testified to numerous arrests for accosting and soliciting, and to the general reputation of the Vernor Bar as a place where the services of a prostitute can easily be obtained." See also *People v Lee*, 307 Mich 743, 753; 12 NW2d 418 (1943), upholding admission of testimony of three witnesses about the "general reputation in the vicinity" of a house of prostitution in an action to convict the owner of the house.

Several members of that neighborhood testified about numerous incidents where they had personally been accosted and solicited. The arresting officer confirmed that many arrests for prostitution were made in that neighborhood. Several neighbors testified that they had been solicited on more than one occasion. One witness testified that he had observed acts of prostitution near the corner of Eight Mile and Gardendale and that on one occasion he found his young son staring at strange vehicles parked near that corner in which men and women were apparently committing acts of prostitution. These incidents reflect concerns identical to those cited in *Garfield* and *Bloss*, *supra*.

Thus, the present case involves a condition that, on the basis of the record below, is a public nuisance in this neighborhood. It cannot be contested that a significant threat to public peace and safety exists in the Eight Mile and Sheffield neighborhood. Vehicles that enter the neighborhood in order to solicit acts of prostitution are being "used for" the continuance of this nuisance. Therefore, we would hold that the nuisance abatement statute allows the abatement of a vehicle where the driver entered into and thereby contributed to an existing condition that is a public nuisance.[22]

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[22] We note that our position is limited to situations in which a nuisance condition exists, regardless of the city. Therefore, a vehicle could not be abated if the same situation arose in another area of Detroit, such as Palmer Woods, where certainly no such nuisance condition exists.

D

This remedy is also buttressed by our review of the overall objective of the nuisance abatement statute. We note that in 1988, minor changes were made to the statute.[23] It appears clear from the amendment that the Legislature intended to remedy the inevitable decline of vice-laden neighborhoods. In the amendment, references to "narcotic and/or hypnotic drug" were changed to the broader and more encompassing phrase, "controlled substance." The arguments presented in support of the amendment stated: "Dope houses are a plague upon the city neighborhoods in which they occur. Drug trafficking, violent crime, and theft endanger and disrupt the lives of law-abiding citizens. The appearance of dope houses can put an entire neighborhood into decline."[24]

The legislative objective was also addressed in *People ex rel. Wayne Prosecuting Attorney v Sill*, 310 Mich 570; 17 NW2d 756 (1945). In *Sill*, this Court held that the purpose of the nuisance abatement statute[25] was "to eliminate

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[23] The 1988 amendment was in effect when the act occurred in the Bennis vehicle.

[24] House Legislative Analysis, HB 4317, May 13, 1987.

[25] The present statute is almost identical to its predecessor on which the *Sill* case is based. The statute read as follows:

> Any building, vehicle or place used for the purpose of lewdness, assignation or prostitution or gambling, or used by, or kept for the use of prostitutes or other disorderly persons, or used for the unlawful manufacture, storing, possessing, transporting, sale, keeping for sale, giving away, bartering, furnishing or otherwise disposing of any vinous, malt, brewed, fermented, spirituous or intoxicating liquors or any mixed liquors or beverages, any part of which is intoxicating, is hereby declared a nuisance and the furniture, fixtures and contents of any such building, vehicle or place, and all such intoxicating liquors therein are also declared a nuisance, and all such nuisances shall be enjoined and abated as hereinafter provided. Any person, or his servant, agent or employe who shall own, lease, conduct or maintain any building, vehicle or place used for any of the purposes or by any of the persons above set forth or where any of the acts above enumerated are conducted, permitted or carried on, is guilty of a nuisance. [1929 CL 9093. Cf. n 1.]

effectively, by statutory procedure, the use of property, real or *personal*, in connection with gambling, *prostitution*, and illicit sale of liquor. . . . " *Id.* at 575 (emphasis added). Similarly, *State ex rel Wayne Co Prosecuting Attorney v Bernstein*, 57 Mich App 204, 208; 226 NW2d 56 (1974), held that "[t]he padlock law is designed to facilitate the elimination of certain situations which have been found to interfere with a substantial community interest." Thus, we believe that our position is consistent with the intent of the Legislature.

E

Moreover, the holding in *State ex rel. Attorney General v Robinson*, 250 Mich 99; 229 NW 403 (1930), is analogous to our position in the present case and conclusively persuades us that we have achieved a remedy consistent with the legislative intent. In *Robinson*, *one* apartment in a fifty-unit building was abated where proof of a *single* incident of prostitution was submitted. A police officer witnessed a solicitation by a prostitute and the entry of

the apartment to commit the act. Although there was proof of only one act of prostitution in the abated apartment, this Court considered the general reputation of the building and the fact that the woman pleaded guilty to charges of prostitution and concluded that "the nuisance use of the premises . . . can be found without drawing on the imagination." *Id.* at 104.

The dissent maintains that reliance on *Robinson* is misplaced. The dissent's recitation of the facts of *Robinson*, however, only confirms that it is persuasive authority for the proposition that a single act sufficiently constitutes a nuisance where a larger nuisance condition exists. The dissent correctly states: "A police officer witnessed *a* solicitation outside the building, watched two persons go into the building, and arrested the pair when they came out of the building." *Post*, p 746 (emphasis added). It is vital to note that ultimately the *only* apartment abated was the one in which a *single* act of prostitution occurred. Further, it was only abated after consideration of the reputation of the larger nuisance condition existing in the building itself, which *could not* be abated in that case.

As previously stated, the nuisance abatement statute has remained virtually unchanged since *Robinson*, and our position therefore would apply a priori to the present case. The one act of prostitution in *Robinson* was considered with regard to the general reputation of the entire building. Similarly, the one act of nuisance by Mr. Bennis in his vehicle must be viewed in light of the larger and continuing nuisance occurring in the neighborhood. Where testimony surrounding proof of an incident of

prostitution unequivocally establishes that the neighborhood has a reputation for prostitution, the property contributing to the continuance of the nuisance may be abated pursuant to the statute. To hold otherwise would allow the criminal actors to circumvent the statute where a different vehicle was used in the commission of each offense. The result would permit the continuing blight of neighborhoods, contrary to the clear intent of the statute. Accordingly, we would hold that the Court of Appeals erred in concluding that the act of prostitution occurring in the Bennis vehicle in a neighborhood known for prostitution was not an abatable nuisance.

IV

Finally, we consider whether a co-owner's interest in a vehicle may be abated where the co-owner had no knowledge that the vehicle was used in a manner proscribed by the nuisance abatement statute. Despite the clear and unambiguous language of the statute indicating that a property owner's knowledge or consent is not required,[26] decisions of this state have nonetheless reached different conclusions with respect to this issue. We would resolve the conflict and would hold that knowledge is not required.

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[26] "Proof of knowledge of the existence of the nuisance on the part of the defendants or any of them, is not required." MCL 600.3815(2); M.S.A. 27A.3815(2). The language is nearly identical to the original language of the public nuisance statute: "Proof of knowledge of the existence of such nuisance on the part of the defendants or any of them, shall not be required." 1925 PA 389, § 9.

A

The schism has its underpinnings in *Schoonmaker, supra,* a pre-1988 case. *Schoonmaker* seemingly required proof of an owner's consent to the illegal use of the property to be abated. The clear language of the nuisance abatement statute abrogates the requirement of knowledge.[27] In *Schoonmaker,* certain illegal acts were committed by people attending a dance hall. However, those acts were not committed inside the dance hall; instead, patrons consumed intoxicating liquor outside the hall. In this manner, all proscribed activity was divorced from the property sought to be abated. The property itself was not in any way used to facilitate the proscribed act, unlike the set of facts before us.

On the basis of these facts, it appears that Justice WIEST in *Schoonmaker* did not intend a result inconsistent with the nuisance abatement statute. Additionally, it is apparent that Justice WIEST did not intend to contradict the provision of the abatement statute because only three years later in *Robinson, supra* at 103, Chief Justice WIEST concluded that the statute "expressly obviates need of knowledge on the part of the owner of nuisance use of his premises."

Schoonmaker, however, begat confusion regarding the statutory requirement of knowledge. Subsequent cases have ruled consistently with the result that an owner's knowledge is not required. *Bitonti, supra,* and *People ex rel Wayne Prosecuting Attorney v Tate,* 306 Mich 667; 11 NW2d 282 (1943), involved the abatement of a motor vehicle

[27] See n 26.

illegally used for gambling. Both cases relied on the statute, holding that an owner's knowledge is not required.[28] However, several other cases apparently read *Schoonmaker* to require the owner's knowledge.[29] In light of the plain language of the nuisance abatement statute and the Michigan Supreme Court decisions in *Robinson, Bitonti,* and *Tate,* we would hold that the statute expressly obviates the requirement that an owner consent to or acquiesce in the illegal use of property.[30] We likewise would

[28] Also, in *State ex rel Oakland Prosecuting Attorney v Weaver,* 74 Mich App 462, 464; 254 NW2d 68 (1977), the Court of Appeals again considered the knowledge requirement of the nuisance statute and concluded: "Considering the clear language of the statute, we are convinced that *Robinson, Bitonti* and *Tate* are correct."

[29] In *State ex rel Wayne Prosecuting Attorney v Weitzman,* 21 Mich App 705, 711; 176 NW2d 463 (1970), the Court held that an owner must have knowledge of acts of prostitution before padlocking the premises. *Weitzman* acknowledged *Robinson* and its progeny, but chose the course initiated by *Schoonmaker. Id.* Likewise, in *Motorama, supra* at 228, the Court of Appeals returned to the *Schoonmaker* decision, after *Weaver,* n 28 *supra* stating that it had never been formally overruled. Motorama also cited dicta from *Levenburg, supra,* supporting its decision requiring an owner's knowledge:

> [W]e acknowledge that a judgment for abatement in a prosecution of this nature cannot be rendered without a finding of knowledge of the accosting and soliciting on the part of the owners or operators of the place found to be a nuisance and their acquiescence in those activities. [*Id.* at 462, n 1.]

[30] As explained in *McKibbin v Corp & Securities Comm,* 369 Mich 69, 81; 119 NW2d 557 (1963), "[w]e have no other duty to perform than to construe the legislative will as we find it, without regard to our own views as to the wisdom or justice of the act."

hold that *Schoonmaker* is distinguishable because in that case "[i]ntoxicating liquor was not used in the dance hall but secreted by patrons outside of the hall and secretly visited." *Id.* at 182.[31]

B

Finally, therefore, we consider the constitutional significance of the abatement of Mrs. Bennis' interest in the vehicle. We assume, arguendo, that Mrs. Bennis did not have knowledge of or consent to the misuse of the Bennis vehicle, of which she was co-title owner. Historically, consideration was not given to the innocence of an owner because the property subject to forfeiture was the evil sought to be remedied.[32] As recently as the landmark forfeiture case, *Calero-Toledo v Pearson Yacht Leasing Co,*

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[31] To the extent the reasoning of *Schoonmaker* may be read to imply that an owner must know that the property is being used in proscription of the statute, we choose not to follow it.

[32] See, e.g., *The Palmyra*, 25 US (12 Wheat) 1, 14; 6 L Ed 31 (1827), in which Justice Story held that "[t]he thing is here primarily considered as the offender, or rather the offence is attached primarily to the thing. . . ." In *United States v The Little Charles*, 26 F Cas 979, 982; 1 Brock 347 (CC D Va, 1818) (No. 15,612), Chief Justice Marshall held that the proceeding was "against the vessel, for an offence committed by the vessel, which is not less an offence, and does not the less subject her to forfeiture, because it was committed without the authority, and against the will of the owner." *Dobbins' Distillery v United States*, 96 US 395, 400; 24 L Ed 637 (1877), stated that "[b]eyond all doubt, the act of Congress in question attaches the offence to the distillery, and the real and personal property connected with the same. . . ." *Harmony v United States*, 43 US (2 How) 210, 238; 11 L Ed 239 (1844).

416 US 663, 683; 94 S Ct 2080; 40 L Ed 2d 452 (1974), the United States Supreme Court has reflected this view: "the innocence of the owner of property subject to forfeiture has almost uniformly been rejected as a defense."

In *Van Oster v Kansas*, 272 US 465, 467; 47 S Ct 133; 71 L Ed 354 (1926), the Supreme Court upheld the forfeiture and sale of an automobile used to transport liquor as proscribed by a Kansas statute. In declaring the vehicle a common nuisance, the Court rejected the innocent owner's Fourteenth Amendment due process claim because "the offense of unlawful transportation was committed by one entrusted by the owner with the possession and use of the offending vehicle."

In *Calero, supra*, the Supreme Court forfeited a lessor's interest in a yacht used to transport marijuana. The lessor had no knowledge that the yacht was used illegally.[33] Consistent with *Van Oster, supra*, the Court stated that it "has been implied that it would be difficult to reject the constitutional claim of an owner whose property subjected to forfeiture had been taken from him without his privity or consent." *Calero, supra* at 689. *Calero* went further and stated in dicta that "the same might be

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[33] The Court ultimately held that the boat subject to forfeiture was voluntarily entrusted to a lessee who illegally used it and that, because there was no allegation or proof that the innocent lessor "did all that it reasonably could to avoid having its property put to an unlawful use," forfeiture was appropriate, despite the company's lack of knowledge. *Id.* at 690. The Court further stated that the contested forfeiture statutes "further the punitive and deterrent purposes that have been found sufficient to uphold, against constitutional challenge, the application of other forfeiture statutes to the property of innocents." *Id.* at 686.

said of an owner who proved not only that he was uninvolved in and unaware of the wrongful activity, but also that he had done all that reasonably could be expected to prevent the proscribed use of his property. . . . " *Id.*

Applying the principles of *Van Oster* and *Calero*, it is evident that Mrs. Bennis' claim is without constitutional consequence. Mrs. Bennis was a joint owner who explicitly or implicitly *entrusted* Mr. Bennis with the use and possession of their vehicle. *Van Oster, supra.* It is clear from *Calero* that the abatement of property stolen from the owner or taken without the owner's knowledge would be prohibited. However, on the basis of the facts before us, the argument cannot be made that the vehicle was stolen or initially driven without Mrs. Bennis' knowledge.

Moreover, in the Michigan forfeiture case, *People v One 1979 Honda Automobile*, 139 Mich App 651, 655-656; 362 NW2d 860 (1984), the Court of Appeals held that knowledge by one co-owner of the illegal activity was sufficient to forfeit the interest of both owners. The car was forfeited[34] in that case even though one of the titled owners had no knowledge of the illegal activities committed within the car. *Id.* The unconstitutionality of the forfeiture was not even considered.[35]

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[34] The car was used to facilitate an illegal drug transaction.

[35] See also *In re Forfeiture of $53*, 178 Mich App 480, 495; 444 NW2d 182 (1989), in which the Court again considered the issue and this time determined that the forfeiture statute "was intended to establish a separate defense for *each* claimant who has a personal interest in the property as an owner." Although the Court did not forfeit the interest of the innocent owner, the decision was based on statutory construction, not a constitutional violation.

Having concluded that the abatement of the Bennis vehicle is not constitutionally infirm, we address the dissent's contention that "the trial court has broad discretion to fashion an appropriate remedy." *Post*, p. 753. It is not contested that this is an equitable action. That being the case, it is critical to recognize that the trial judge considered alternatives on the record and, in the exercise of his discretion, fashioned an appropriate remedy, abating the entire interest in the vehicle. We merely sanction the trial judge's action, which is clearly permitted under the nuisance abatement statute, and find that such action was not an abuse of discretion.

Review of the controlling cases persuades us that no constitutional violation results from the abatement of Mrs. Bennis' interest in the vehicle. The United States Supreme Court indisputably allows forfeiture of an innocent owner's property, unless evidence was submitted that the property was stolen or used without the consent of the owner.[36] *Van Oster; Calero, supra.* Other jurisdictions addressing the issue have allowed the abatement of

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[36] We note the distinction between the situation in which a vehicle is used without the owner's consent and, although the owner consented to the use, it is used in a *manner* to which the owner did not consent. In the former, the innocent owner's interest could not be abated. *Van Oster; Calero, supra.* In the latter, as in the present case, the innocent owner's interest may be abated.

a co-owner's interest on strikingly similar facts.[37] The Michigan nuisance abatement statute specifically obviates the requirement of proof, and because the statute does not violate the constitution, the Court of Appeals incorrectly held that proof of knowledge of the proscribed activity is required. Additionally, we do not find that the trial judge abused his discretion in fashioning an appropriate remedy, abating the entire interest of the vehicle.

V

In summary, we would hold that an act of lewdness as defined herein occurred and made the vehicle abatable. Moreover, reviewing the entire record, we find that an act of fellatio occurred so as to create a clear inference that it was for monetary compensation. Proof of an actual exchange of the money is not required by the statute or

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[37] Similarly, in *People v Garner*, 732 P2d 1194, 1196 (Colo, 1987), the Colorado Supreme Court held that the entire ownership of an abated vehicle *could not* be vested in the innocent co-owner wife. The court stated that the district court had "inherent equitable authority" to allocate a portion of the proceeds after costs to the innocent owner. Under the statute, however, the court *was not* obliged to do so. Further, in any event, the court could not award the innocent co-owner wife full ownership of the vehicle.

In *In re 1976 Blue Ford Pickup*, 120 Ariz 432, 435; 586 P2d 993 (Ariz App, 1978), the Arizona Court of Appeals upheld forfeiture of a truck jointly owned by a mother and son where the mother had no knowledge of the prohibited use of the truck. The son's illegal possession of marijuana subjected the truck to forfeiture, and the mother's status as an innocent owner could not "salvage the vehicle from the forfeiture occasioned through the activities of the joint owner."

decisions of this Court. Thus, alternatively, we would hold that a complete act of prostitution occurred in the Bennis vehicle. Additionally, because the act occurred in a neighborhood that was a place reputed for prostitution and therefore a public nuisance, Mr. Bennis' vehicle contributed to that continuing nuisance and may be abated. Finally, we would hold that the clear and unambiguous language of the Michigan nuisance statute obviates the requirement of an owner's knowledge of the proscribed activity and that the statute unquestionably passes constitutional muster. For all of the foregoing reasons, we would reverse the decision of the Court of Appeals.

BOYLE and MALLETT, JJ., concurred with RILEY, J.

GRIFFIN, J., concurred only in the result.

CAVANAGH, C.J. (*dissenting*). As Mr. Rogers would say, "It's a wonderful day in the neighborhood." In this public nuisance abatement case, the focus should be clear: Was the defendants' vehicle an abatable public nuisance? I cannot agree with the lead opinion's mystical concept that under the statute we can call the *condition* of an entire neighborhood a public nuisance. Nor can I agree with its invention that any vehicle contributing to this condition can be abated.

I remain unconvinced that the conduct at issue in the instant case comes within the scope of the public nuisance abatement statute. Assuming arguendo that it does, I do not believe that a single incident, absent circumstances giving rise to a reasonable inference of habitual and continuing nuisance activity, is sufficient to support abatement. Therefore I dissent.

I. THE SINGLE INSTANCE OF ACTIVITY ISSUE

Assuming arguendo that the conduct did fall within the scope of the public nuisance abatement statute, the issue becomes whether a single instance of that conduct establishes an abatable public nuisance.

The lead opinion states:

> [W]e must next determine whether *an* act of prostitution committed in a neighborhood known for illicit activity is within the purview of the statute. [*Ante*, pp 729-730.]

There are serious flaws with the mystical concept that follows. The lead opinion examines the *evidentiary* provision of the statute and finds the word "place." Yet, "place" is already used in the statutory provision that defines an abatable public nuisance, i.e., § 3801: "Any building, vehicle, boat, aircraft, or place. . . . " MCL 600.3801; MSA 27A.3801.

The lead opinion reasons:

> The nuisance abatement statute's use of the disjunctive "or" allows us to consider the reputation of the vehicle *or* the place to determine whether a nuisance exists. [*Ante*, p 733.]

The lead opinion then relies on the dictionary definition of "place" to reach "neighborhood." Relying on testimony about prostitutes in the neighborhood, the lead opinion concludes that this "condition" of the *neighborhood* is a public nuisance.

Note, the lead opinion would not hold that the *vehicle is* the nuisance. It cites *People ex rel Wayne Co Prosecutor v Sill*, 310 Mich 570; 17 NW2d 756 (1945), as support. In *Sill*,

the *car* that was used for gambling purposes was declared the nuisance. *Id.* at 572. It also cites *State ex rel Wayne Co Prosecuting Attorney v Bernstein*, 57 Mich App 204; 226 NW2d 56 (1974). In *Bernstein*, the *bar* where the prostitutes were soliciting was declared the nuisance. *Id.* at 205. It also relies on *State ex rel Attorney General v Robinson*, 250 Mich 99; 229 NW 403 (1930). There, the *apartment* where the act of prostitution occurred was declared the nuisance. *Id.* at 104. None of these cases supports the holding that the condition is the nuisance.

The lead opinion addresses the single incident issue in one short passage. It relies on *State ex rel Attorney General v Robinson, supra.*

In *Robinson*, the defendant's building contained fifty apartments. The building had a reputation for prostitution. A police officer witnessed a solicitation outside the building, watched two persons into the building, and arrested the pair when they came out of the building. The woman told the officer that they had used apartment 404. The trial court abated twenty-two of the apartments. This Court reversed the abatement order with respect to twenty-one of the apartments on the basis of the statutory provision that the nuisance activity must have occurred within thirty days of filing the complaint. *Id.* at 103. Since only the particular incident in apartment 404 had occurred within the thirty days preceding the filing of the complaint, the Court found that abatement of the other twenty-one apartments was improper. However, it abated apartment 404 on the basis of the incident observed by the police officer and because the Court found that the activity in that apartment was not an isolated event on the basis of the reputation of the building. *Id.* at 103-104.

Robinson is clearly distinguishable. The apartment was a permanent part of the building. Therefore, the reputation of the building is logically relevant to a permanent part of the building. Contrary to the statement of the lead opinion that the building in *Robinson* could not be abated, the *Robinson* Court stated that "if the apartment was not identified, then the whole house might be closed." *Id.* at 104. Conversely, the vehicle in the instant case was not a permanent part of the "condition," as the lead opinion defines it. Furthermore, because the proper focus in this case is on the vehicle that the plaintiff sought to abate, the reputation of the area is not relevant to whether this particular vehicle is a public nuisance where the vehicle was not permanently connected to the area. Additionally, there is no evidence that continuing nuisance activity was occurring in *this* vehicle.

In the instant case, the lead opinion would hold:

> Where testimony surrounding proof of an incident of prostitution unequivocally establishes that the neighborhood has a reputation for prostitution, the property contributing to the continuance of the nuisance may be abated pursuant to the statute. [*Ante,* p 737.]

The subject of the holding, "property contributing to the continuance of the nuisance," is far too broad and unlimited in scope.

The prosecutor brought this action to abate the defendants' *vehicle.* The public nuisance abatement statute provides:

> Any . . . vehicle, . . . used for the purpose of lewdness, assignation or prostitution . . . , is declared a nuisance, . . . and all . . . nuisances

> shall be enjoined and abated as provided in this act and as provided in the court rules. [MCL 600.3801; MSA 27A.3801.]

The prosecution established only one incident of sexual activity involving *this* vehicle. Further, there was no evidence to create a reasonable inference that the sexual activity in *this* vehicle was habitual or continuing.

The Court of Appeals majority followed the approach taken in *State ex rel Oakland Co Prosecutor v Motorama Motel Corp,* 105 Mich App 224; 307 NW2d 349 (1981), to find that a single incident of lewdness was not sufficient. The *Bennis* majority reasoned:

> The *Motorama* approach best effectuates the purpose of the statute. The abatement statute was enacted to subject houses of prostitution to abatement as nuisances. *State ex rel Wayne Co Prosecutor v Diversified Theatrical Corp,* 396 Mich 244, 246-250; 240 NW2d 460 (1976). The purpose of the act has also been described as eliminating the use of property in connection with gambling, prostitution, and the illicit sale of liquor. *People ex rel Wayne Prosecuting Attorney v Sill,* 310 Mich 570, 575; 17 NW2d 756 (1945); *State ex rel Oakland Prosecuting Attorney v Ginell,* 159 Mich App 679, 681-682; 407 NW2d 59 (1987). The statute is not intended to regulate the morality of individuals, or to prevent incidents of immorality in, for example, hotels that are otherwise respectable establishments. See *Diversified Theatrical Corp, supra,* 247.
>
> As in *Motorama,* we hold that a single incident is insufficient to establish a nuisance. Further, the circumstances of this case do not permit a reasonable inference that the conduct

was habitual. In this case, the prosecution has alleged only a single incident to support the contention that defendants' car was a nuisance. While the prosecution discusses at length the reputation and record of . . . the woman found in the car with Mr. Bennis, this does not establish that defendants' car was used on more than that occasion for lewdness, assignation, or prostitution. Similarly, testimony was presented that Mr. Bennis was seen on more than one occasion driving in that area and talking to women. Not only does this observed conduct not prove that defendant was involved in lewdness, assignation, or prostitution, there was no evidence to establish that this conduct, if it occurred, took place in the vehicle in question. In fact, defendants allegedly purchased the car only three weeks before the incident that gave rise to this action. [200 Mich App at 675-676.]

In *Motorama*,[1] the panel stated that "[a] nuisance involves the notion of repeated or continuing conduct and should not be based upon proof of a single isolated incident unless the facts surrounding that incident permit the reasonable inference that the prohibited conduct was habitual in nature." *Motorama*, at 229-230, citing *People v Bitonti*, 306 Mich 115, 119-120; 10 NW2d 329 (1943).

I would continue this limitation.[2] The New York Court of Appeals similarly follows this approach:

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[1] In *Motorama*, the defendant's hotel was across the street from a bar that was frequented by persons engaged in prostitution. The Court held that the single incident at the hotel was insufficient to support abatement of a nuisance.

[2] See 58 Am Jur 2d, Nuisances, § 77, p 730:

> Nuisance, as a general rule, involves the idea of continuity or recurrence; the maintenance of a nuisance ordinarily implies a continuity of action over a substantial period of time, and the continuance of the acts constituting the nuisance for an unreasonable period. Thus, it has been said that to constitute a nuisance there must be a continuousness or a recurrence of the acts by which it is created.

See, generally, Glesner, *Landlords as cops: Tort, nuisance & forfeiture standards imposing liability on landlords for crime on the premises*, 42 Case W Res L R 679, 716-737 (1992). "Arrests can constitute evidence of a nuisance, but they must be sufficiently frequent to establish a *habitual* illegal use of the property." *Id.* at 732 (emphasis added).

> [W]e do not hold, that any premises on which an isolated act of lewdness, assignation or prostitution occurs is subject to the remedies of [the houses of prostitution abatement statute]. Rather, we agree . . . that "the People will have to show a *consistent pattern* of conduct sufficient to prove that the premises are being employed for a proscribed use." The most significant factors in making this factual determination will be the frequency of the conduct, the knowledge or even encouragement by the defendant of its existence, and the extent of the benefit, direct or indirect, derived by defendant from such activity. [*People ex rel Arcara v Cloud Books, Inc*, 65 NY2d 324, 331; 491 NYS2d 307; 480 NE2d 1089 (1985) (emphasis added) (citation omitted), rev'd on other grounds 478 US 697 (1986) (first amendment issue), modified on remand 68 NY2d 553; 510 NYS2d 844; 503 NE2d 492 (1986).][3]

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[3] See also *New York City v Big Apple Spa*, 130 Misc 2d 920, 923; 497 NYS2d 988 (1986): "One incident of prostitution has been established. An isolated incident is, of course, not enough."

Further, the public nuisance abatement statute is aimed at property that has become so associated with the activity that it has become part of the activity. In *State ex rel Carroll v Gatter*, 43 Wash2d 153, 160; 260 P2d 360 (1953), the Washington Supreme Court construed its state's "red-light" statute, which, like Michigan's "red-light" statute, i.e., the public nuisance abatement statute, was derived from the Iowa abatement statute.[4] It explained the function of the statute:

> To sustain the application of the act, it must be shown to the satisfaction of the court, by a preponderance of the evidence, that the premises were being used as a house of lewdness, assignation, or prostitution as that term is generally understood. The "use" of the premises of which the statute speaks, requires more than a showing that sporadic acts of prostitution occurred therein. . . .
>
> The statute is not directed to the abatement of commercial eroticism – that is governed by the criminal statutes. It is directed to the abatement of premises which, by reason of sufficient happenings therein, *have absorbed and taken the character of the acts committed, and have in fact become houses of lewdness, assignation or prostitution.* [*Id.* at 160. Emphasis added.]

Additionally, the use of the vehicle in the instant case is distinguishable from the use of vehicles in the "numbers racket" gambling cases because the use of the Bennis vehicle was not "essential" to the act of gross

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[4] See *State ex rel Wayne Co Prosecutor v Diversified Theatrical Corp*, supra at 246-247.

indecency. The vehicle was merely a convenient location. By contrast, this Court has held that in the numbers racket situation "[t]he use of automobiles as *essential tools* in this type of gambling is generally recognized." *Sill* at 575 (emphasis added). Where the vehicle is an *essential* tool to accomplish continuing nuisance activity, the argument that a single act is sufficient is much stronger.

In the instant case, I would find that there was no evidence to support a reasonable inference of continuing or habitual illegal activity. Therefore, it was improper to abate the defendants' vehicle.

II. THE KNOWLEDGE ISSUE

As explained above, I do not believe that the conduct at issue was within the scope of the public nuisance abatement statute, nor was it proven to be of a continuing nature. However, in anticipation of cases that do involve proscribed nuisance activity, I address the proof of knowledge issue.

Beginning with *People v Schoonmaker*, 241 Mich 177; 216 NW 456 (1927),[5] two lines of contrary precedent have

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[5] In *Schoonmaker*, the Court considered whether a public dance hall was an abatable public nuisance under an earlier version of this statute. The defendants did not serve alcohol on the premises, but some of their patrons secretly slipped outside the building during the dance to consume alcohol. The Court addressed the threshold of conduct required on the part of the defendant:

> Defendants did not maintain a nuisance unless they permitted such illegal use of the premises; that

developed through Michigan case law regarding whether the plaintiff must show that the owner of the property knew that the nuisance activity was occurring before the property can be abated.[6] In the instant case, the lead opinion addresses the issue and concludes that proof of knowledge is not required. The statute clearly provides that proof of knowledge is not required.[7] And, although abating the property of innocent owners in forfeiture actions arguably does not violate an

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is, consented to it or acquiesced, and whether they did so was a question of fact. . . .

* * *

One inviting the public to his place for commercial purposes must take care not to invite or acquiesce in transgressions of the law. That transgressions may happen is possible, but remain offenses of the wrongdoer unless tolerated by the occupant to the extent of permissive use of the premises for such purpose or indifference thereto. The statute does not deprive one person of the use of his property by reason of the illegal acts of another, unless the owner's use bears a participating relation to the violation. [*Id.* at 181.]

See *State ex rel Wayne Co Prosecutor v Levenburg*, 406 Mich 455, 462, n. 1; 280 NW2d 810 (1979); *State ex rel Oakland Co Prosecutor v Motorama Motel Corp*, *supra* at 228; *State ex rel Wayne Co Prosecutor v Weitzman*, 21 Mich App 705, 710-711; 176 NW2d 463 (1970).

[6] Other cases held that the statute obviated the need for proof of knowledge. See *Bitonti*, at 119 (plurality); *Robinson*, at 103; *State ex rel Oakland Co Prosecutor v Weaver*, 74 Mich App 462, 464; 254 NW2d 68 (1977).

[7] MCL 600.3815; MSA 27A.3815.

owner's constitutional right to due process,[8] that does not make such forfeitures fair or equitable.

The abatement of public nuisances is an equitable action. MCL 600.3805; MSA 27A.3805. See MCR 3.601; 58 Am Jur 2d, Nuisances, § 321, pp 911-912. As such, the trial court has broad discretion to fashion an appropriate remedy.[9] 58 Am Jur 2d, Nuisances, § 355, pp 946-947. Historically, an equity court would not enjoin criminal activity, except in nuisance cases. See Dobbs, Remedies (2d ed), § 2.9(3), p 169. One must remember that the public nuisance abatement action arose in equity because the available legal remedies, i.e., criminal penalties, were

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[8] See *Calero-Toledo v Pearson Yacht Leasing Co*, 416 US 663; 94 S Ct 2080; 40 L Ed 2d 452 (1974).

In the instant case, after reviewing cases from the United States Supreme Court, the majority states:

> The United States Supreme Court indisputably allows forfeiture of an innocent owner's property, unless evidence was submitted that the property was stolen or used without the consent of the owner. [*Ante*, p 742.]

This statement sweeps too broadly. The statement should be limited to due process considerations. The United States Supreme Court has recently held that forfeitures of property under 21 USC 881, the drug forfeiture statute, are subject to the excessive fines constitutional provision. *Austin v United States*, 509 US ___; 113 S Ct 2801; 125 L Ed 2d 488 (1993).

[9] This Court has recognized this broad authority: "Of the transcendent power in an equity court, under its general jurisdiction, to restrain and abate a continuing public nuisance for which, by reason of its extent and nature, there is no plain and adequate legal remedy, there can be no question." *Detroit v Highland Park*, 186 Mich 166, 182; 152 NW 1002 (1915).

inadequate to stop future and continuing injury.[10] Correspondingly, equity courts have shown reluctance to intervene where the activity is criminal. In *People v Lim*, 18 Cal 2d 872; 118 P2d 472 (1941), the California Supreme Court considered whether a gambling establishment could be abated in the absence of a specific statutory provision. It explained the reluctance of equity courts to intervene:

> Conduct against which injunctions are sought in behalf of the public is frequently criminal in nature. While this alone will not prevent the intervention of equity where a clear case justifying equitable relief is present . . . , it is apparent that the equitable remedy has the collateral effect of depriving a defendant of the jury trial to which he would be entitled in a criminal prosecution for violating exactly the same standards of public policy. . . . The defendant also loses the protection of the higher burden of proof required in criminal prosecutions and, after imprisonment and fine for violation of the equity injunction, may be subjected under the criminal law to similar punishment for the same acts. For these reasons *equity is loath to interfere* where the standards of public policy can be enforced by resort to the criminal law, and in the absence of a legislative declaration to that effect, the courts should not broaden the field in which injunctions against criminal activity will be granted. [*Id.* at 880. Emphasis added.]

[10] See *Marsland v Pang*, 5 Hawaii App 463, 475-478; 701 P2d 175 (1985) (reviewing an equity action for nuisance abatement). See, generally, Patterson, *California land use regulation post Lucas: The history and evolution of nuisance and public property laws portend little impact in California*, 11 UCLA J of Envtl & Poly L 175, 186-197 (1993) (history of public nuisance). See *Lucas v South Carolina Coastal Council*, 505 US ___; 112 S Ct 2886; 120 L Ed 2d 798 (1992).

Particularly, where there is no evidence that the conduct at issue will be continuing in the future, the court should hesitate to exercise its equitable powers to abate the property.[11]

Consequently, I would hold that the trial court, exercising its equitable discretion, should consider the equities and circumstances of each case and tailor the remedy to fit the situation. See *People ex rel Wayne Co Prosecutor v Tate*, 306 Mich 667, 669; 11 NW2d 282 (1943) (the decision to deny an abatement order is within judicial discretion).

The Court in *People v Garner*, 732 P2d 1194 (Colo, 1987), illustrated the remedial possibilities for situations involving innocent parties.[12] The *Garner* court noted the equitable powers of the trial court:

> Our construction of the Public Nuisance Statute to require the forfeiture of a jointly

[11] See 58 Am Jur 2d, Nuisances, § 324, p 913 ("injunctive relief against nuisances should be cautiously given").

[12] The *Garner* court explained:

> [T]he court in the exercise of its equity powers had the authority to order a sheriff's sale of the vehicle on the condition that one-half of the proceeds of the sale, after deduction of fees and costs incident to the seizure and the abatement action, be paid to [the ex-wife], or that [the ex-wife] be given the opportunity to bid at the sheriff's sale on the forfeited interest of [the husband] and thereby acquire the entire interest in the vehicle, or that the vehicle be delivered to the seizing agency . . . upon the agency's payment of one-half of the fair market value of the vehicle to [the ex-wife]. [*Id.* at 1198-1199.]

owned vehicle determined to be a public nuisance, even though one of the co-owners is innocent of any wrongdoing, does not mean that the innocent party's interest in the vehicle may not be recognized and conserved. On the contrary, an action for an abatement of a . . . public nuisance is equitable in nature, . . . and while a court in the exercise of its equity powers may not act contrary to statutory mandate, it does retain a considerable degree of discretion and flexibility in fashioning a decree that achieves a fair result under the particular circumstances of the case. . . . In a forfeiture situation, therefore, a court retains the authority to protect, to the extent practicable and within the framework of the statutory dispositional alternatives, the interest of the innocent party. [*Id.* at 1197. Citations omitted.]

For instance, a trial court could order the property sold, with proportionate net proceeds to be paid to innocent owners, or the court could allow the innocent owners to bid at the sale and acquire full ownership interest, or the government agency itself could pay the proportionate net worth directly to the innocent owners. By leaving such a determination to the equitable discretion of the trial court, each case will be decided on its own merits.

In the instant case, the vehicle was jointly owned by Mr. and Mrs. Bennis. Mrs. Bennis had no knowledge that her husband used the vehicle to engage in an act of gross indecency. Assuming arguendo that his conduct came within the reach of the abatement statute, I would hold that the trial court should tailor a remedy to protect her property interest.

In reaching its conclusion that Mrs. Bennis' property interest may be abated, the lead opinion cites *People v One 1979 Honda Automobile*, 139 Mich App 651; 362 NW2d 860 (1984), to support its proposition that proof of knowledge is not required. Its reliance is misplaced. There, the arrangement between the co-owners, a father and his daughter, was really a secured transaction.[13] The father loaned his daughter money to purchase the car. The daughter was the sole driver of the car. The forfeiture action arose because of her use of the car to make a delivery of marijuana. In the drug statute forfeiture provisions there is an exemption for innocent owners. The issue was whether the father's lack of knowledge exempted the vehicle from forfeiture. Instead, the panel focused on the daughter's knowledge and found it sufficient to support forfeiture. The panel did not address the effect of forfeiture on the father's interest. Additionally, *1979 Honda* did not arise under the nuisance abatement statute. Further, this case is factually distinguishable because Mr. and Mrs. Bennis owned the vehicle as joint owners – not as lender/borrower.

The lead opinion tries to distinguish *In re Forfeiture of $53*, 178 Mich App 480; 444 NW2d 182 (1989), because it was based on statutory construction – not constitutional violation. There, the panel thoroughly considered the statutory "innocent owner" defense found in MCL

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[13] A father and a daughter were co-title owners of the car. However, the father did not live with his daughter, his address was not on the registration, the daughter had sole possession of the car, and she paid all the insurance premiums.

333.7521; MSA 14.15(7521). The panel examined federal and state law interpretations. The panel concluded:

> To summarize, we conclude that § 7521(1)(d)(ii) was intended to establish a separate defense for each claimant who has a personal interest in the property as an owner. Hence, where the prosecution commences an action against a conveyance that is used for unlawful narcotics activity, the forfeiture of the res is subject to the interest of a co-owner who proves that the proscribed act was done without his or her knowledge or consent, express or implied. *The state may only forfeit the ownership interest of the noninnocent owner.* If, for example, the innocent owner has a fifty percent interest in the vehicle, the property may be sold and the proceeds divided equally between the state and the innocent co-owner. [*Forfeiture of $53* at 495-496 (emphasis added).]

Even though this *Forfeiture of $53* arose under a different statute, I believe that it supports an approach that protects innocent co-owners.

In the case at bar, the lead opinion also cites *In re 1976 Blue Ford Pickup*, 120 Ariz 432, 586 P2d 993 (Ariz App, 1978). While it is true that the court upheld the forfeiture of the mother's joint interest in the truck, the court did so after focusing on the unique facts of the case.[14] Arguably, the case was the exception to the general rule. The vehicle was titled in the names of mother *or*

[14] The mother bought the car with her own money and originally titled the car in her name *and* her son's name. The son moved to Arizona, and the title was changed to mother *or* son. *Id.* at 433-434.

son. Under Arizona law, such a title allows *either* joint owner to transfer complete ownership interest in the vehicle without consent of the other.[15] Further, the son had exclusive possession of the vehicle in another state. Unfortunately for the mother, she could have preserved her interest had she been a secured creditor, rather than co-owner. *Id.* at 435.

Notwithstanding its determination of the outcome, the *Blue Ford Pickup* court cited with approval the general rule that innocent owners will not lose their interests:

> "[A]n automobile may *not* be forfeited . . . unless the owner has some connection with the unlawful act, or intended to permit the automobile to be used by a third person in the commission of the unlawful act, or had knowledge it was to be so used. This is in line with the trend of the more recent decisions of the United States Supreme Court in the protection of constitutional rights, both of person and property." [*Id.* at 434, quoting *In re One 1965 Ford Mustang*, 105 Ariz 293, 300; 463 P2d 827 (1970) (emphasis added).]

III. CONCLUSION

I disagree with the conclusion of the lead opinion that the "condition" of the "neighborhood" is the public nuisance. I also disagree with the position of the lead opinion that a single act of prohibited conduct is sufficient to support abatement, without evidence that the

[15] The statute requires consent to such transfers at the time joint owners obtain such a certificate of title.

conduct is habitual or continuing. Public nuisances, by their very nature, imply a continuing condition. The public nuisance abatement statute is aimed at property that has become so associated with an activity that it has become part of the activity. In the instant case, the vehicle was only a convenient site for the activity to occur. This situation is far different from shutting down a building, i.e., a brothel or a crack house, that has become so associated with the illegal activity that it has become part of the activity. Here, the vehicle can be driven out of the "neighborhood" without becoming permanently tainted as a lewd or prostitution vehicle. Additionally, this situation is far different from shutting down a gambling operation that, as an *essential part of its operation*, uses the vehicles to transport betting slips and money.

In conclusion, I would hold that the activity that occurred in this vehicle is insufficient to subject it to abatement under the public nuisance abatement statute.

I would affirm the judgment of the Court of Appeals.

LEVIN and BRICKLEY, JJ., concurred with CAVANAGH, C.J.

LEVIN, J. (*dissenting*). The nuisance abatement statute, as originally enacted in 1915, declared that a "building or place" used for the purpose of prostitution was an abatable nuisance.[1]

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[1] 1915 PA 272 reading in part as follows:

Section 1. Whoever shall conduct, maintain, own or lease any building or place used for the purpose of lewdness, assignation or prostitution is guilty of a nuisance, and the building or place in or upon which such lewdness, assignation or prostitution is conducted, permitted or carried on, and the furniture, fixtures, and contents are also declared a nuisance, and shall be enjoined and abated as hereinafter provided.

Ten years later, during the Prohibition era, "building or place" was amended to add "vehicle," so that it read "building, *vehicle* or place." For the purpose of "prostitution" was changed to read for the purpose of "prostitution or gambling," and to include such a building, vehicle, or place "used by, or kept for the use of prostitutes or other disorderly persons," or used for the manufacture of, or trafficking in, intoxicating beverages.[2]

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[2] 1925 PA 389 reading in part as follows:

Section 1. Any building, vehicle or place used for the purpose of lewdness, assignation or prostitution or gambling, or used by, or kept for the use of prostitutes or other disorderly persons, or used for the unlawful manufacture, storing, possessing, transporting, sale, keeping for sale, giving away, bartering, furnishing or otherwise disposing of any vinous, malt, brewed, fermented, spirituous or intoxicating liquors or any mixed liquors or beverages, any part of which is intoxicating, is hereby declared a nuisance and the furniture, fixtures and contents of any such building, vehicle or place, and all such intoxicating liquors therein are also declared a nuisance, and all such nuisances shall be enjoined and abated as hereinafter provided. Any person, or his servant, agent or employe [sic] who shall own, lease, conduct or maintain any building, vehicle or place used for any of the purposes or by any of the persons above set forth or where any of the acts above enumerated are conducted, permitted or carried on, is guilty of a nuisance.

The foregoing statutory provision was amended by 1951 PA 80 to add "boat" and "aircraft" as property subject to abatement

I

In the seventy years since the 1925 enactment adding the word "vehicle," there has been no prior reported prosecution of a person for the use of a vehicle for the purpose of prostitution. It thus appears that no automobile used by a man to visit a house of prostitution, or to visit a hotel or apartment house frequented by prostitutes, was abated as a nuisance.[3]

The statute has not heretofore been employed to abate the use of property by someone who was not himself engaged in the illicit activity as a business.[4]

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and forfeiture, and to add trafficking in "narcotic and/or hypnotic drugs" as illicit businesses.

1988 PA 2 substituted "controlled substance" for "narcotic and/or hypnotic drugs."

The current statute, MCL 600.3801; MSA 27A.3801, is set forth in the majority opinion, n 1.

[3] No taxicab, even a taxicab that had been waiting outside a bar frequented by prostitutes, was abated as a nuisance.

No automobile used by a prostitute who hailed men from the vehicle, or who used the vehicle to make a house call, was abated as a nuisance.

I do not wish to be understood as saying that a taxicab so used, or an automobile so used by a prostitute, might not be subject to abatement.

[4] In the following cases, vehicles were found to be nuisances on evidence tending to show that they were used in gambling enterprises. See *People ex rel Wayne Co Prosecutor v Bitonti*, 306 Mich 115; 10 NW2d 329 (1943); *People ex rel Wayne Co Prosecutor v Tate*, 306 Mich 667; 11 NW2d 282 (1943); *People ex rel Wayne Co Prosecutor v Sill*, 310 Mich 570; 17 NW2d 756 (1945); *State ex rel Wayne Co Prosecutor v Martin*, 314 Mich 317; 22 NW2d 381 (1946).

I would hold that a vehicle is not subject to a nuisance abatement action unless the person owning or in lawful possession of the vehicle is engaged in and uses the vehicle in the conduct of illicit activity, described in the statute, as a business.

II

The lead opinion states: "Where testimony surrounding proof of an incident of prostitution unequivocally establishes that the neighborhood has a reputation for prostitution, the property contributing to the continuance of the nuisance may be abated pursuant to the statute."[5] The lead opinion concludes that "the act of prostitution occurring in the Bennis vehicle in a neighborhood known for prostitution" was an abatable nuisance.[6]

The lead opinion thus would hold that a vehicle used by a customer of a prostitute becomes an abatable nuisance when such use contributes to a preexisting prostitution nuisance in a neighborhood, and that a vehicle may be found to so contribute when it is driven to a neighborhood where prostitutes congregate and is used in the commission of an act of prostitution in such a neighborhood.

The lead opinion thus appears to recognize that ordinarily the occasional use by a person, not himself engaged in an illicit activity as a business, of his vehicle to participate in illicit conduct, was not intended by the

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[5] *Ante*, p 737.

[6] *Id.*, p 737.

Legislature to permit the declaration of the vehicle as an abatable nuisance even though the customer's conduct might be punishable as a criminal offense.

The reasoning of the lead opinion would mean that a customer's vehicle used for prostitution may be abated as a nuisance when driven to and so used on Eight Mile Road in Detroit, but not when so used in Northville or Charlevoix. Some prosecutors and judges may think that way, but legislators do not.

I suggest that compliance with the admonishment, quoted approvingly by the lead opinion, that "[w]e have no other duty to perform than to construe the legislative will as we find it,"[7] requires that we not attribute to the Legislature an intent to permit the seizure of a customer's vehicle, only occasionally used in illicit activity, when the customer is not himself engaged in the illicit activity as a business.

The Legislature may, of course, amend the statute to provide for the seizure of customer vehicles, but, if the Legislature does so, it will surely so provide without regard to the neighborhood in which the customer of a prostitute uses his vehicle, whether in Northville, Charlevoix, or Detroit.

III

Among the least persuasive arguments advanced by the lead opinion is the contention that "place" means the

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[7] *McKibbin v Corp & Securities Comm*, 369 Mich 69, 81; 119 NW2d 557 (1963), quoted approvingly, *ante*, p 739, n 30.

neighborhood, and that it must be so construed to give meaning to all the words in the statute.[8] The word "place" was part of the original enactment, "building or place."[9] The Legislature had in mind that there might be a place that was not a building that might be used for prostitution that should be subject to an abatement action.

The general reputation of the place was admissible under the statute for the purpose of showing that the place is a nuisance.[10] An automobile was not such a place when this legislation was first enacted in 1915. Vehicles were not added until 1925, at which time the Legislature distinguished between the general reputation of a building, and of a vehicle, and of a place.[11] The general reputation of a place may be considered for the purpose of showing that the place is a nuisance, and of a vehicle for the purpose of showing that the vehicle is a nuisance.[12] But the general reputation of a place where the vehicle is driven or used may not, under the statutory provision for use of general reputation evidence, be relied on for the purpose of showing that the vehicle is a nuisance.

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[8] *Ante*, p 733.

[9] See n 1.

[10] 1915 PA 272, § 3.

[11] 1925 PA 389, § 9. See n 12.

[12] In any action brought under this chapter, evidence of the general reputation of the building, vehicle, boat, aircraft or place is admissible for the purpose of proving the existence of the nuisance. [MCL 600.3815(1); MSA 27A.3815(1).]

Unless a vehicle is itself a nuisance, it is not subject to abatement, and it is not within the intendment of the statute.

Unless a place is itself a nuisance, i.e., a place used for the purpose of prostitution, or used by or kept for the use of prostitutes, it is not subject to abatement, and it is not within the intendment of the statute. The Legislature clearly did not intend that an entire residential neighborhood where prostitutes roam was, as a place, subject to abatement.

IV

The reliance of the lead opinion on the statutory language stating that the prosecutor is not required to provide "[p]roof of knowledge of the existence of the nuisance on the part of the defendants or any of them,"[13] to justify its conclusion that an innocent owner's share of the property is subject to forfeiture, is misplaced. This statutory provision only relieves the prosecutor of the burden of showing such knowledge as part of his prima facia case that there is a nuisance subject to abatement.[14]

This statutory provision does not make an owner's lack of knowledge immaterial or irrelevant regarding

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[13] MCL 600.3815(2); MSA 27A.3815(2).

[14] See 2 McCormick, Evidence (4th ed), § 342, Presumptions in General, pp 449 ff; § 343, Reasons for the Creation of Presumptions: Illustrative Presumptions, pp 454 ff; § 344, The Effect of Presumptions in Civil Cases, pp 460 ff.

See also LaFave & Scott, Criminal Law (2d ed), § 213, Constitutional Limitations – Due Process and Statutory Presumptions, Defenses, and Exceptions, pp 158 ff.

whether property that is subject to abatement as a nuisance should be forfeited. As a matter of statutory construction, I would hold that an innocent co-owner's share of the vehicle is not subject to forfeiture. Such a construction is especially called for where the Court by construction today enlarges the application of the nuisance abatement statute beyond its letter and beyond any prior application in its seventy-year history.

ORDER
Entered:

December 30, 1994

Michigan Supreme Court
Lansing, Michigan
Michael F. Cavanagh
Chief Justice

Charles L. Levin
James H. Brickley
Patricia J. Boyle
Dorothy Comstock Riley
Robert P. Griffin
Conrad L. Mallett, Jr.
Associate Justices

PEOPLE OF THE STATE OF MICHIGAN ex rel WAYNE COUNTY PROSECUTOR,

Plaintiff-Appellant,

v

JOHN C. BENNIS and TINA B. BENNIS,

Defendants-Appellees.

SC 97339
CoA 132568
LC 88-824379-CZ

This cause having been brought to this Court by appeal from the decision of the Court of Appeals and having been argued by counsel and due deliberation having been had thereon by the Court, IT IS HEREBY ORDERED that the judgment of the Court of Appeals is REVERSED in conformity with the opinion filed herein.

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

(SEAL) January 23, 1995 /s/ Corbin R. Davis
Clerk

SUPREME COURT OF THE UNITED STATES

No. 94-8729

Tina B. Bennis,

Petitioner

v.

Michigan

ON PETITION FOR WRIT OF CERTIORARI to the Supreme Court of Michigan.

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

June 5, 1995